IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1909.

THE UNITED STATES, *Appellant,* *vs.* OBERLIN M. CARTER, LORENZO D. CARTER, I. STANTON CARTER, HORACE G. STONE, NATHANIEL C. SEARS, THE INTERNATIONAL AUDIT COMPANY, ROBERT NELSON and LYMAN E. COOLEY, *Appellees.*	No. 551. Appeal.
OBERLIN M. CARTER et al., *Appellants,* *vs.* THE UNITED STATES, *Appellee.*	No. 552. Cross-Appeal.

BRIEF FOR THE UNITED STATES ON THE APPEAL.

STATEMENT OF THE CASE ON THE APPEAL OF THE UNITED STATES.

(1)

This cause comes to this court on an appeal and cross appeal from a final decree rendered on March 18, 1909, by the Circuit Court of Appeals of the

United States for the Seventh Circuit, in an equity cause originally instituted by the United States against Oberlin M. Carter *et al.*, in the Circuit Court of the United States for the Northern District of Illinois, and which is docketed in said Circuit Court as equity cause No. 25980, and which, after final decree in that court, went on appeal entered by the United States and cross-appeal entered by Oberlin M. Carter *et al.* from that court to said Circuit Court of Appeals, and in which final decree was entered in the latter court as aforesaid, all of which will fully appear by reference to the record of said cause filed in this court.

(2)

The bill in said cause was filed by the United States as complainant in the Circuit Court of the United States for the Northern District of Illinois on August 27, 1901, for the purpose, among other things, of subjecting to the claims of the United States assets held by said Oberlin M. Carter and his agents, in that district, and charged to be investments made with, and proceeds of trust funds alleged to have been diverted, through the conspiracy and fraud of Oberlin M. Carter, Benjamin D. Greene, John F. Gaynor, and others, to the use of Oberlin M. Carter, from public moneys of the United States intrusted to said Oberlin M. Carter for river and harbor improvements.

(3)

Similar bills had been filed by the United States and were and are pending against Oberlin M. Carter and his agents in the Circuit Courts of the United States for other districts, and prior to November 6, 1901, assets had been tied up on said bills in the hands of receivers in said causes and on mesne process to await the result of said litigations, which at cost and proceeds (Rec., vol. 1, pp. 395 to 397) aggregated as follows:

The Southern District of New York, under order of July 30, 1901, and order appointing receiver pendente lite October 12 and 13, 1901 (Rec., vol. 19, pp. 9348, 9351, 9359)	$29,294.71
The District of New Jersey, under order of July 30, 1901, and order appointing receiver pendente lite October 14, 1901 (Rec., vol. 19, pp. 9402, 9403, 9404)	52,567.13
The Southern District of West Virginia, under order of August 31, 1901, and September 16, 1901 (Rec., vol. 19, pp. 9447–9448)	190,571.58
The Southern District of Georgia, under injunction order of August 6, 1901 (Rec., vol. 19, p. 9493)	15,913.50
	$288,346.92

(The above statement of facts from the record are the same as in paragraph (3) of the petition of United States for prohibition and stay, original No. 10 at this term, and are admitted to be a correct statement in the answer thereto, page 2, filed by John B. Daish, attorney for O. M. Carter.)

(4)

I Stanton Carter, the brother of Oberlin M. Carter, and Lorenzo D. Carter, the uncle of said Oberlin M. Carter, defendants to the said bill in the Northern District of Illinois, were charged therein as having

in their possession, custody, and control, and holding the same for Oberlin M. Carter, a large amount of the securities and other investments and proceeds thereof described in said bill, made with the trust funds so alleged to have been diverted by Oberlin M. Carter and claimed by the Government; the said Circuit Court of the United States appointed a receiver in said cause to make demand upon the said I. Stanton Carter and Lorenzo D. Carter for said assets, and to hold the same subject to the further order of the court; and the defendant Lorenzo D. Carter, in reply to the demand of the receiver for the aforesaid assets, denied that he had any of the same in his possession or under his control (Rec., vol. 1, p. 98); and the defendant I. Stanton Carter, in reply to the demand of the receiver for the aforesaid assets, denied that he had any of the same in his possession or under his control except one Michigan Telephone Company bond and one Kentucky Central Railroad Company bond, which he claimed as his own and declined to turn over to the receiver (Rec., vol. 1, p. 97); and on September 23, 1901, on report of the receiver to the court of the replies of I. Stanton Carter and Lorenzo D. Carter to his said demands, the court issued a rule against the said defendants to show cause as for a contempt of court for having failed and refused to turn over the assets demanded (Rec., vol. 1, p. 100); and on October 21, 1901, the defendants, I. Stanton Carter and Lorenzo D. Carter, filed answers to said rule for contempt, making the same denials as to the possession or control of said assets as they had made to the re-

ceiver as aforesaid (Rec., vol. 1, pp. 112, 115, 117); and on October 28, 1901, the return day for hearing on rule *nisi* for appointment of a receiver *pendente lite,* by agreement of the parties under an order of the court, the receiver's appointment was continued of force, with his rights that of a receiver *pendente lite* (Rec., vol. 1, p. 117); and at that time and at the time of the stipulation or agreement of November 6, 1901, hereinafter mentioned, the said rule for contempt was pending in said Circuit Court and on the calendar for trial, and complainants were contending that aside from the $288,346.92 of the assets which had been previously tied up in other districts in the hands of the receivers and on *mesne* process, there was $190,425.00 of assets described in the bill and claimed therein by the Government as aforesaid which it had traced to the possession of the defendants, I. Stanton Carter and Lorenzo D. Carter, unaccounted for by them and which they should, under the orders of the court made, turn over to the receiver for the Northern District of Illinois for custody *pendente lite.*

(The above statement of facts from the record are the same as in paragraph (4) of said petition of United States for prohibition and stay, and are admitted to be correct in said answer thereto, page 2, filed by John B. Daish, attorney for O. M. Carter.)

(5)

On November 6, 1901, a stipulation was entered into between the parties and approved by the court (Rec., vol. 1, p. 119), which said stipulation was as follows:

STIPULATION OF NOVEMBER 6TH, 1901.

UNITED STATES OF AMERICA } ss.

United States of America
v.
Oberlin M. Carter *et al.* } In Equity.

Pending on bill and auxiliary bills in the Circuit Courts for the Southern District of New York, District of New Jersey, Southern District of Georgia, Southern District of West Virginia, Northern District of Illinois, and Southern District of Illinois.

AGREEMENT.

It is agreed between the United States, complainants, and Oberlin M. Carter, I. Stanton Carter and Lorenzo D. Carter, defendants in the above-entitled cause, as follows:

(1) The issue as between the United States and Oberlin M. Carter as to the fraudulent diversion of funds, intrusted to him as disbursing officer, into the assets as charged in complainant's bills pending in the several districts, shall be brought to final decree first in the Circuit Court of the United States for the Northern District of Illinois, and the final decree of that court, unless reversed by the appropriate appellate court on appeal shall be conclusive on all questions determined therein, and shall be made effective by appropriate decrees on the bills in the

other districts if deemed necessary by either party.

But this clause shall not be construed to operate to the prejudice or delay of the Government in any proceeding against other parties for accounting in districts other than the Northern District of Illinois, who may be claiming for themselves any part of said assets.

(2) That as to the assets claimed by the Government as assets into which it charges the funds intrusted to Oberlin M. Carter as disbursing officer was diverted, with the proceeds, income and reinvestments thereof where the form of the investments have been changed, and which assets have or may be hereafter traced into the possession, custody or control of said defendants, and have not heretofore been *bona file* disposed of by them and therefore beyond their control, shall be forthwith by the said defendants turned over to the receiver appointed in this cause. But the court will determine whether the one Kentucky Central bond and one Michigan Telephone bond charged in the bill to be reinvestments of said alleged trust fund, and which bonds are claimed by I. Stanton Carter, should be held by the receiver pending the litigation.

(3) The said defendants shall waive their privilege and give all the information they can with regard to what property has been disposed of and its disposition, but no evidence which may be given by the said Carters in this case shall ever be used against them in any criminal proceedings, unless on a charge of perjury committed in this case. And nothing in this agreement shall be construed as affecting the right of the Government if any it has to recover any part of said assets disposed of by the said defendants and not turned over to the receiver.

(4) L. D. Carter and I. Stanton Carter will forthwith dismiss their demurrers and file answers disclaiming any personal interest in the

aforesaid assets in controversy in this litigation, including the real estate on 8th avenue, New York, and at Orange, New Jersey, except as to the two bonds claimed by I. S. Carter as above.

(5) Oberlin M. Carter shall dismiss all demurrers and exceptions and shall file promptly his answers to the bills and amended bills pending in said several districts.

(6) All private books, papers etc. of Oberlin M. Carter turned over to the court-martial shall be subject to the inspection of the counsel for said Carter, and his chief counsel shall have the right to have made at the expense of the fund turned into court, a copy of any documentary evidence which has ever been used or referred to as evidence in the court-martial or Greene-Gaynor proceeding, or in this proceeding.

(7) From said fund to be accounted for to the receiver, the sum of $5,000.00 shall be left in the hands of H. G. Stone, chief counsel of said Oberlin M. Carter, from which to compensate and cover the expense of employment of local counsel in any of the districts in which local counsel have been or may be employed in any branch of this case.

(8) From said fund, to be accounted for to the receiver, there shall be paid:

(*a*) The fees, traveling expenses, and other expenses of Oberlin M. Carter's chief counsel and of his attorney at Chicago, to be fixed and allowed by the court.

The importance of the case, and the means and methods taken to bring the same to a just determination speedily and not the length to which the proceedings may be protracted, to be considered as the elements of merit in fixing such fees.

(*b*) Also the fee of his attorney for representing said Carter in case of any criminal trial in Georgia, if Carter should be placed on trial there prior to the final disposition of this case.

(*c*) The expenses of taking evidence in behalf of said Carter, including the services of an accountant at not exceeding ten dollars per day for his services when needed and actually employed, plus his expenses, if any.

(*d*) And if before the final determination of this cause the said Oberlin M. Carter shall be liberated from prison he shall be allowed his reasonable personal expenses incurred by him while engaged in work in this cause, including the taking of evidence, but with no compensation for his time. Such expenses to be determined by the court and paid out of the monies in court.

Payments and allowances under paragraph numbered "(8)" of this agreement to be determined by the court from time to time on petition with the right of the United States to contest the same as unreasonable, or that any expense was not incurred as stated.

(9) The assent of the United States to paragraphs numbered "(1)," "(7)," and "(8)" of this agreement, is predicated upon the understanding that the said defendants will turn over to the receiver at least substantially all of the assets turned over to I. Stanton Carter, and L. D. Carter, by J. H. Paul and R. E. Westcott and James Bragg, or their proceeds and reinvestments, except such as has been, prior to the receivership, *bona fide* paid out or pledged by them for attorneys' fees or as expenses in defense of Carter, or expended by them legitimately in the handling of said properties, or which has not already been taken possession by receivers in this cause.

Nov. 6, 1901.

UNITED STATES OF AMERICA,
By MARION ERWIN,
Special Asst. to Attorney-General.
OBERLIN M. CARTER,
LORENZO D. CARTER,
I. STANTON CARTER,
By HORACE G. STONE,
Their Chief Counsel.

ORDER.

The foregoing agreement is approved and ordered spread of record in said cause.

Indorsement, agreement, and order to spread same of record entered. Filed Nov. 6, 1901. G. W. Burnham, Clerk.

(The above statement of facts from the record are the same as in paragraph (5) of said petition of the United States for prohibition and stay, and are admitted to be correct in said answer thereto, page 2, filed by John B. Daish, attorney for O. M. Carter, except as to immaterial errors of punctuation, which are corrected in the copy above set out by comparison with the original stipulation.)

(6)

And following said stipulation of November 6, 1901, said I. Stanton Carter delivered to the receiver, Max H. Whitney, in said cause assets aggregating at par value $71,660.00 (Rec., vol. 1, pp. 297-298), and claimed that these were all the assets for which he was accountable to the receiver under the orders of the court and said stipulation, and in his answer filed February 1, 1902 (Rec., vol. 1, p. 141), did not disclaim any personal interest in the assets claimed by the United States in its said bills as provided by said stipulation.

(The above statement of facts from the record

are the same as in paragraph (6) of said petition of the United States for prohibition and stay, and are admitted to be correct in said answer thereto, page 3, filed by John B. Daish, attorney for O. M. Carter.)

(7)

And said Lorenzo D. Carter did not, following said stipulation, turn over forthwith to said receiver the assets claimed by complainant in its said bills, and in his hands, as provided in said stipulation, and in his answer filed February 1, 1902 (Rec., vol. 1, p. 139), [redacted] did not disclaim any personal interest in the assets claimed by the United States in its said bills as provided by said stipulation, but instead thereof admitted that he was then retaining 21 Kentucky Central Railroad Company bonds, of the par value of $21,000.00, described and claimed by complainant in its said bill (Rec., vol. 1, p. 31) as being an investment made with said trust fund, and set up in his answer a personal claim thereto, alleging that he had paid out his own money on behalf of said Oberlin M. Carter to the value of said bonds.

(The above statement of facts from the record are the same as in paragraph (7) of said petition of the United States for prohibition and stay, and are admitted to be correct in said answer thereto, page 3, filed by John B. Daish, attorney for O. M. Carter.)

(8)

Said complainant, being dissatisfied with the accounting which said I. Stanton Carter and Lorenzo D. Carter had made to the receiver for the assets claimed by the complainant in its said bills and traced into their hands, obtained from the court an order of reference to William M. Booth, master (Rec., vol. 1, p. 148), requiring him to take evidence and report on said matter under the terms of said order of reference.

(9)

The said Lorenzo D. Carter and I. Stanton Carter appeared before the said master in person and by Horace G. Stone, chief counsel for Oberlin M. Carter and for themselves, and after the United States had put in its proof, admitted (see (Rec., vol. 10, p. 5042) the receipt by them of the assets claimed by said complainant and traced to them, but claimed credit against a large amount of said receipts by them, for alleged disbursements claimed to have been made by them for account of Oberlin M. Carter, and a large part of which claims for credit, after evidence taken, the master in his report to the court found to be false, and disallowed (Rec., vol. 10, pp. 5051, 5052, 5054, 5059-5060); besides which the said defendant Lorenzo D. Carter undertook (Rec., vol. 10, pp. 5037-5059), before the master, to set off as a personal claim against the aforesaid

trust fund traced into his hands as aforesaid, a claim for $15,000.00 for alleged salary due him by Oberlin M. Carter; and I. Stanton Carter undertook (Rec., vol. 10, pp. 5038-5042), before the master, to set off as a personal claim against the aforesaid trust fund traced into his hands as aforesaid, a claim for $7,500.00 for alleged salary due him by Oberlin M. Carter. Over the objection of complainant that said claims for salary should not be allowed to be set off against the said assets admitted by the said I. Stanton Carter and Lorenzo D. Carter to have been received and retained by them, as well because of the provision in the stipulation of November 6, 1901, that they were to disclaim all personal interest in said assets, and forthwith deliver the same to the receiver, and because the proof showed that they had received the said assets with notice of the claim of the United States thereto, the master allowed in his report to the court a set-off of $6,750.00 to said I. Stanton Carter on account of his said salary claim (Rec., vol. 10, p. 5053), and the master allowed in his report to the court a set-off of $12,916.66 to said Lorenzo D. Carter on account of his said salary claim (Rec., vol. 10, p. 5053); and after allowing said set-offs of $19,666.66 against the said assets traced into their hands, the master in his report (Rec., vol. 10, p. 5070) found that I. Stanton Carter and Lorenzo D. Carter were still short in accounting and in turning over to the receiver $9,343.15 received by them from J. H. Paul, James Bragg, and R. E. Westcott, and $21,529.15 of said trust assets claimed in the complainants' bill and traced from other sources; and the master

also found (Rec., vol. 10, p. 5070) that the two bonds which I. Stanton Carter had in his answer claimed as his own, had been purchased with said trust fund and should be turned over to the receiver, and whereas the master reported (Rec., vol. 10, p. 5071) that said Lorenzo D. Carter should turn over to the receiver ten of the twenty-one Kentucky Central bonds, but that Lorenzo D. Carter should be allowed to retain the other eleven of said bonds as a set-off to said salary claimed as due him by said Oberlin M. Carter; and after the said finding of the master, the said Lorenzo D. Carter, on March 13, 1903, turned over the ten of said Kentucky Central bonds of the par value of $10,000 to the receiver (Rec., vol. 1, p. 299), but still retained eleven of them.

(The above statement of facts from the record are the same as in paragraph (9) of said petition of the United States for prohibition and stay, and is neither admitted nor denied in the said answer of John B. Daish, attorney for O. M. Carter.)

(10)

Complainant duly filed in said Circuit Court its exceptions to said report of the master on several grounds, among others on the allowance by the master of said set-offs for salaries claimed by said Lorenzo D. Carter and I. Stanton Carter as due them by Oberlin M. Carter, and to his finding that they should be allowed to retain the said trust assets in their hands to the amount of the salaries so al-

lowed them by the master (Rec., vol. 1, pp. 318-340); and the defendants, I. Stanton Carter and Lorenzo D. Carter, also filed certain exceptions to the master's report. (Rec., vol. 1, p. 353.)

(The above statement of facts from the record are the same as in paragraph (10) of said petition of the United States for prohibition and stay and are admitted to be correct in said answer thereto, page 3, filed by said John B. Daish, attorney for O. M. Carter.)

(11)

Thereafter, to wit, on January 4, 1904, a certain interlocutory decree (Rec., vol. 1, p. 150) was rendered in said Circuit Court on said exceptions to the master's report, and that in the said interlocutory decree it was provided:

> "(1) That so much of said master's report as allows salaries as such to I. Stanton Carter and Lorenzo D. Carter and sets the same off against the assets for which they are accountable to the receiver be, and the same is hereby, set aside, the question of the right of the said defendants to set up said claims for salaries as against the funds turned over to the receiver, or for which they may be held accountable, being hereby reserved for the hearing on final decree with the other issues on the merits of the main controversy between the United States and the defendants, O. M. Carter, I. S. Carter, and L. D. Carter."

And whereas this interlocutory decree further directed the turning over to the receiver by I. S. Carter of the one Michigan Telephone bond and the one

Kentucky Central bond withheld by him, and the turning over to the receiver by L. D. Carter of the eleven Kentucky Central bonds which he had withheld up to this time, which bonds were turned over to the receiver on January 8 and 13, 1904. (Vol. 1, pp. 305-306.)

And whereas the said interlocutory decree further provided (vol. 1, p. 151):

> "(3) It is further ordered and decreed that when I. Stanton Carter and Lorenzo D. Carter shall have complied with the foregoing provisions of this decree, that they shall have sufficiently accounted to the receiver *as far as they should be required on this interlocutory proceeding* for the assets remaining in their hands, to put in operation clauses one (1), seven (7), and eight (8) of the agreement of November 6, 1901.
>
> (4) The question raised on the exceptions of the United States to alleged excess expenses allowed by the master to I. S. Carter and L. D. Carter, and exceptions to the alleged excess of credit allowed by the master to L. D. Carter for amounts claimed as paid to J. H. Winkler, and exceptions as to the liability to the United States of I. S. Carter and L. D. Carter to account for assets in controversy traced into their hands and which they claimed before the master not then to have, as well as the questions raised by the exceptions of defendants to certain items charged by the master to them, and to certain items of credits which they claim in their exceptions that the master should have given them in stating their account, and the proper restatement of said account, are all not finally passed on herein, but are reserved for the decree of the court on the merits of the cause on final hearing, and further argument of counsel, with leave to either party to take and offer additional evidence."

And among the exceptions filed by complainants to the master's report, which by the terms of this interlocutory decree were not finally passed on but reserved for final decree, were exceptions which if sustained would show that I. Stanton and L. D. Carter had in their hands unaccounted for at the date of the interlocutory decree of January 7, 1904, $41,269.75 of the proceeds of trust assets in controversy converted into money (Vol. 10, pp. 347-349) and after the delivery of the thirteen bonds which they were required to deliver by that decree (which cost $11,077.59) they would be still short $30,192.16 in their accounting to the receiver. And the same exceptions (Vol. I, p. 350), if sustained, would show that $21,288.04 of said $41,269.75 not accounted for by L. D. and I. S. Carter were from the assets received by them from said Paul, Westcott and Bragg, and by the terms of said agreement of November 6, 1901, the right of Carter to have the allowances for his defense was dependent upon the delivery by I. S. and L. D. Carter of substantially all the assets received from said Paul, Westcott and Bragg. (Vol. 1, p. 121.)

(The above statement of facts from the record are the same as in paragraph (11) of said petition of the United States for prohibition and stay and are admitted to be correct in said answer thereto, page 3, filed by John B. Daish, attorney for O. M. Carter.)

(12)

Thereafter on February 10, 1904 (Rec. Vol. 1, p. 169) before the said cause had reached a hearing on the merits and while the questions raised by the United States in its exceptions to the master's report as to noncompliance by defendants with the conditions of the stipulation of November 6, 1901, compliance with which was made a prerequisite to the making of the allowances for the defense therein provided for, were still held in reserve for determination on final hearing on the merits, Frank P. Blair, one of the attorneys for Oberlin M. Carter, filed a petition in said Circuit Court for an allowance of fees to him from the fund in the hands of the receiver. To this petition the United States on February 13, 1904, filed an answer (Rec. Vol. 1, p. 171) setting forth among other things:

> "That the fees of counsel for the defense for services in the cause to be rendered after the date of the agreement were to be paid out of the fund when the cause reached a determination on its merits, and were (under the agreement) to be fixed in amount according as the record showed that means and methods adopted by counsel insure a speedy and just determination."

After the filing of said answer, Mr. Blair abandoned in open court the pressing of said petition, and it was never passed on by the court. This was the first attempt made by counsel for O. M. Carter to claim allowances for fees under said stipulation of November 6, 1901.

(13)

It appears from the record that on February 10, 1904 (Rec. Vol. 1, p. 168), Horace G. Stone, as chief counsel for O. M. Carter, also filed a petition for allowance of attorney's fees out of the funds in the hands of the receiver claimed to be under said stipulation.

It does not appear that said petition was served upon counsel for the United States, nor any answer filed to it by the United States, but it does appear that on February 15, 1904, Judge Kohlsaat made and entered in said cause (Rec. Vol. 1, p. 178) the following order:

> "In view of the agreement of record in this cause of November 6, 1901, on motion and petition of Horace G. Stone, chief counsel for defendant, Oberlin M. Carter, and counsel for the United States not resisting, the allowance on account to said Horace G. Stone of a reasonable attorney's fee out of the fund in court claimed both by the United States and by said Oberlin M. Carter, to enable said Horace G. Stone properly to make defense of the claims of said Carter to said fund, but without prejudice to the proper construction of said agreement on future similar applications. The said allowance to be made at this time is fixed by the court at the sum of Six Thousand Dollars, and the receiver, Max H. Whitney, is directed to pay the said sum to the said Horace G. Stone out of the fund in court."

The reservations in said order showing that the court still kept in reserve the questions raised and

insisted upon by the United States in its exceptions that said stipulation had not been complied with by defendants. The order was not in fact a consent order, and the reservation was made by the court to avoid the determination until the final decree of the question of non-compliance on part of defendants with the conditions of the stipulation.

(14)

On May 2, 1904, H. G. Stone presented to the court an expense bill for $1,089.94 for amounts alleged to have been paid out by him for Oberlin M. Carter (but not for any allowance of attorney's fees) and thereupon a consent order was entered by the court in said cause, as follows:

> "H. G. Stone, chief counsel of record of O. M. Carter in the above stated cause, having rendered and filed herewith an account for his expenses in connection with services rendered in the cause under terms of the agreement of record of November 6, 1901, amounting to One Thousand and Eighty-nine 94/100 Dollars ($1,089.94), the correctness of the items of said account having been conceded by counsel for the United States, the receiver is hereby ordered to pay said sum to the said H. G. Stone. This allowance is without prejudice to the right of said Stone to hereafter present certain other claims for allowance covering the same period which are not presented in the present account

by reason of certain objections made by counsel for the United States.

Assented to May 2, 1904. Marion Erwin, Special Asst. to Atty, Gen'l."

The above consent order shows that the United States was still reserving its objections, and only waived them as to the items of expense assented to.

The stipulation (paragraph 8d) provided as to the expense items that they should be paid on interlocutory orders and decrees of the court from time to time, and therefore the court by its decree of January 4, 1904, having held that defendants "have sufficiently accounted to the receiver as far as they should be required on this interlocutory proceeding," the United States could not fairly object to the payment *pendente lite* of these small current expenses necessary to a proper conduct of the case. Such assent was not a waiver of its exceptions to the master's report on the question of non-compliance by defendants with the stipulation which was expressly held in reserve for the final hearing.

(15)

It next appears that on February 13, 1905, H. G. Stone, solicitor for O. M. Carter, submitted to the judge in said Circuit Court a petition for payment from the funds in the hands of the receiver of certain expenses alleged to have been incurred by O. M. Carter, and for an allowance to said H. G. Stone on account of services as attorney for O. M. Carter

and that the United States objected to the same. The said petition is not of record and was never filed—but the court disposed of same by the following order made February 13, 1905 (Rec. Vol 1, p. 201):

> "Horace G. Stone, solicitor for Oberlin M. Carter in the above stated cause, having submitted to the court an account for his expenses incurred as solicitor for O. M. Carter in said cause, and by petition praying an allowance to him from the fund in court for reimbursement for said expenses, and also an allowance for attorney's fees, under the agreement of parties of record November 6, 1901, also submitted an account for personal expenses claimed to have been incurred and paid by said O. M. Carter while engaged in work in this cause, and praying the payment of the same out of the fund in court, under said agreement of November 6, 1901.
>
> And Marion Erwin, solicitor for complainant, having objected to the allowance of said expense accounts as not sufficiently proved and that certain items thereof are not chargeable under the agreement. And by reason of the engagements of the court in other matters, and the engagements of counsel in the work in the main cause —it being impracticable to dispose of said matters by a full hearing at this time, but it being admitted by counsel for the United States that it is in the discretion of the court to make an allowance to said H. G. Stone out of the fund in court, as a payment on account of his fees as attorney for said O. M. Carter, under the agreement of November 6, 1901, and the court having determined that an allowance of $5,000.00 to said Stone at this time, as payment on account of fees as aforesaid is reasonable.
>
> It is ordered that said allowance of $5,000.00 be made, and that the same be paid by the receiver, Max H. Whitney, out of the fund in court. It is further ordered that the sum of

one hundred and fifty dollars per month from November 28, 1903, be allowed to O. M. Carter, out of the fund in court as an advance prior to the adjustment of his expense account on account of his personal expenses while engaged in work in the case to be paid by said Max H. Whitney monthly at the ..... of each month, less the sum of one thousand dollars heretofore advanced to said O. M. Carter under the order of the court, and that the receiver continue to pay said monthly allowance of $150.00 to said O. M. Carter until said expense accounts are adjusted, unless hereafter otherwise ordered by the court."

It will be observed that the above order was not a consent order. That it was made by the court to avoid passing on the questions raised by the United States. Also that the court allowed Carter $150 per month from November 28, 1903 (the time he left the penitentiary) until the further order of the court, "as an advance prior to the adjustment of his expense account, on account of his personal expenses while engaged in the case," under which order Carter was paid by the receiver $7,800 from the general fund *pendente lite* for his personal maintenance up to the final decree (without the rendition of any expense bills (Rec. Vol. 1, 316) and receiver's reports (Rec. Vol. 1, p. 297 to 313) and which was in derogation of the provisions of the stipulation which required the said expenses incurred by Carter to be set forth in a petition from time to time with the right of the United States to contest the same, as unreasonable or that any expense was not incurred as stated.

The provisions of the order show that there was

no waiver by the United States of its contention that the defendants had not complied with the conditions of the stipulation, and that the sums ordered paid thereunder, were ordered to be paid under the supposed plenary powers of a court of equity having in charge a trust fund claimed by two contestants, whose rights were not yet determined, to make advances therefrom, in the nature of costs of administration subject to future adjustment between the parties when their rights were ascertained, without respect to the contention of the parties as to their absolute rights respectively to the fund.

Counsel for the United States insists that there was no admission made by said counsel that there was a discretion in the court, to make said allowances, except as so limited. The reservation in the order for a future hearing on the questions raised, taken in connection with the fact of the pendency of exceptions to the master's report reserved for final hearing and not disposed of until final decree shows that there was no waiver by the United States of its contention of non-compliance with the terms of the stipulation.

(16)

On September 25, 1905 (Rec. Vol. 1, p. 205) a consent order was made by the court to pay over to H. G. Stone from funds in the hands of the receiver $4,250 as a balance which he was to retain under the agreement for fees of local counsel for Carter, the order provided that the said payment "To be without pre-

judice of the rights of the United States, if any they now have, to contend that there has not yet been a full accounting for the assets to be turned over to the receiver."

The government could not fairly have objected at that stage of the proceedings to that particular payment, under the terms of the stipulation, because the stipulation provided (paragraph 7) that

> "From said fund to be accounted for to the receiver, the sum of $5,000 shall be left in the hands of H. G. Stone, chief counsel for said Oberlin M. Carter, from which to compensate and to cover the expense and employment of local counsel in any of the districts in which local counsel have been or may be employed in any branch of this case."

As Mr. Stone had turned over to the receiver all the assets which came into his individual hands except $750, it was necessary that the Government should agree to return to him the $4,250 in order to comply with the stipulation on its own part.

The reservation in the order shows that there was no waiver of the Government's contention that the defendants had not complied with their part of the stipulation.

(17)

On December 11, 1905, said H. G. Stone filed a petition (Rec. Vol. 1, p. 210)asking for $15,000 as allowances on account of fees as attorney for O. M. Carter under said stipulation. To this the United States filed its answer (Rec. Vol. 1, pp. 213-214) in-

sisting that allowances of attorney's fees were not to be made under the stipulation until the final hearing, and that defendants had not complied with their part of the stipulation, and had not turned over to the receiver at least substantially all of the assets turned over to I. Stanton Carter and L. D. Carter by J. H. Paul, R. E. Westcott and James Bragg or their proceeds or reinvestments, except those disposed of prior to the receivership, as they were required to under the agreement as a precedent to the allowance of fees.

On December 11, 1905, the court passed upon said petition by allowing said Stone $2,500 out of the fund in the receiver's hands. (Rec. Vol. 1, p. 215.)

(18)

On January 12, 1907, H. G. Stone gave notice that he would apply on January 14, 1907, to Judge Kohlsaat for an allowance to him on account for O. M. Carter of additional attorney's fees, no petition was filed. The United States filed an answer to the notice objecting to such allowance, and calling attention of the court to the fact that the case had been argued and submitted on the merits, that no such allowance should be made in advance of the decree on the merits. (Rec. Vol. 1, p. 223). On January 14, 1907, the court made an order allowing said Stone $2,500 "as an allowance to him on account of solicitor's fees."

(19)

July 26, 1907, H. G. Stone gave notice that he would apply on August 7, 1907, to Judge Kohlsaat for an allowance to him as counsel for O. M. Carter of additional attorney's fees. No petition was filed. The United States filed answer to said notice (Rec. Vol. 1, p. 224), setting forth the failure of service of any petition, and objecting to any such allowance, and again calling to the attention of the court that the questions involved had been argued on the merits, and that no allowance should be made in advance of the decree on the merits.

The court on August 7, 1907, made an order allowing said H. G. Stone $1,500 out of the fund on account of solicitor's fees.

(20)

Under the foregoing recited orders the said H. G. Stone as chief counsel for O. M. Carter was paid out of the fund in the hands of the receiver of said Circuit Court of the United States for the Northern District of Illinois prior to the determination of said cause on final decree sums aggregating $17,500 as allowances for his fees, and $5,000 for local counsel for Carter in other districts. And O. M. Carter was paid during said period for his maintenance at the rate of $150 per month, $7,800. Besides the other expenses aggregating $5,584.23 of Carter and Stone, which were paid as hereinafter mentioned.

All of which payments were made prior to the determination of the merits as to the ownership of said assets in the hands of said receiver, and during the period when the determination of complainant's exceptions to the master's report, as to the non-compliance of I. Stanton Carter and Lorenzo D. Carter with the provisions of the stipulation of November 6, 1901, was reserved by the court by the interlocutory decree of January 4, 1904, for determination at the hearing on the merits.

(21)

It is claimed by the attorneys for O. M. Carter that the United States was estopped from contending on final hearing that the defendants, I. Stanton Carter and Lorenzo D. Carter, had not performed the conditions upon the performance of which the right of O. M. Carter and his counsel to have allowances from the fund was predicated in the stipulation, not only because of the payments heretofore mentioned as having been made in court, prior to final decree, but because of numerous orders made pending the litigation agreed to by counsel, for payment of certain sums on account, to the receiver, to the examiner, stenographers, for printing, etc.

An examination of these orders will show that they all had expressly or by implication a provision that such payment was "subject to adjustment hereafter between the parties as costs or expenses." See Orders (Rec. Vol. 1, pp. 165, 166, 178-179, 202, 204,

208, 209, 210, 216, 217, 218, 219, 220, 227, 228, 233, 234.)

It is difficult to understand how estoppel can be predicated upon such consent orders containing such reservations, and besides such payments were not predicated on the stipulation, but made for the convenience of the parties.

(22)

On March 21, 1908, the said Circuit Court entered a decree (Rec. Vol. 1, p. 389), by which it was decreed (paragraph 1):

> "That all moneys in any way arising from the profits realized by the contractors under the river and harbor contracts described in the bill and auxiliary bills in this case, constitute a trust fund, and that all of the same, with the investments, proceeds, reinvestments and income thereof constitutes a trust fund which in equity and good conscience is for the benefit of and belongs to the complainant, and that no part of said money so arising, or the investments, proceeds, reinvestments, or income thereof, can be held by the defendant, Oberlin M. Carter, as against the complainant, or by any one not a *bona fide* purchaser for value without notice holding under or through Robert F. Westcott or Oberlin M. Carter."

And by paragraph 2 of said decree, it was decreed that certain assets therein described in the hands of the receivers, aggregating $37,114.75 at cost and par value, were not purchased with said trust

fund, but with the private funds of Robert F. Westcott and Oberlin M. Carter.

> "And all of the said assets in this paragraph described, together with the income and proceeds thereof which have been collected by the receivers, are held to be the property of Oberlin M. Carter and not to have been derived from the said trust fund."

And by paragraphs 3 and 4 of said decree it was decreed that the balance of the assets described therein which went into the hands of the receivers under the bill and auxiliary bills, aggregating some $367,822.71 at cost and par values, were purchased with said trust funds as claimed by the United States.

> "And all of said above described properties (with the exception of those described in paragraph of this decree numbered ('2') as aforesaid, with the proceeds and reinvestments thereof, are decreed to constitute a part of the trust fund belonging to complainant."

And by paragraph 12 of said decree, a money judgment was awarded the United States against I. Stanton Carter for the sum of $11,454.18 "for the amount of said trust fund, not accounted for by him as found by the master."

And by paragraph 10 of said decree it was decreed "that the claim of the complainant to have a deficiency judgment against L. D. Carter is denied."

And by paragraph 11 of said decree it was decreed

> "That the claim of the complainant to have a deficiency judgment against Oberlin M. Carter for so much of the proceeds arising from the trust fund, as it is claimed was dissipated by Oberlin M. Carter or his agents prior to the agreement of November 6, 1901, is denied."

By paragraphs 7 and 8 of said decree:

"The fixing of the costs and expenses of said proceedings, including allowance to be made to receivers, and to counsel, and the charges which may be allowed under the agreement of parties of November 6, 1901, is reserved at the foot of this decree, to be adjudged and passed on by the court" and "the conversion of the assets in court into money so that the same may be disposed of in accordance with the rights of the parties as herein decreed, is reserved at the foot of this decree."

(23)

On April 13, 1908, the United States filed a motion (Rec., Vol. 1, p. 316) reciting and showing from the record that $35,885.23 had been advanced from the fund in the hands of the receiver of said Circuit Court of the Northern District of Illinois under the orders of the court made pending the litigation to Oberlin M. Carter and his counsel which included $7,800.00 advanced to O. M. Carter as aforesaid for his maintenance (without expense bills rendered), $17,500 to H. G. Stone as chief counsel for O. M. Carter, $5,000 to H. G. Stone for local counsel of O. M. Carter in other districts, and $5,585.23 for printing bills, and bill of expert accountant witness. And asked the court to decree that said sums so advanced as well as such additional sums if any, similarly claimed, as might by final decree be allowed, should be decreed to be a first charge upon the assets in court which have been or may be held to be the property of the said O. M. Carter.

"And that all said assets shall be sold and the

proceeds applied first to reimburse the fund in court belonging to the United States for said expenditures made from the fund belonging to the United States and that the United States be decreed to have a judgment against the said O. M. Carter for any deficiency."

(24)

On April 1, 1908, Horace G. Stone, chief counsel for O. M. Carter, filed his petition (Rec., Vol. 1, p. 235) for final compensation claimed under said stipulation of November 6, 1901, to which was attached his affidavit, also the affidavits of W. W. Gurley, of John S. Miller, of John J. Herrick, of John P. Wilson and N. C. Sears as experts on the value of fees; $50 per day or $15,000 per annum for six and a half years was claimed.

On April 9, 1908, the United States filed its answer thereto (Rec., Vol. 1, p. 244), which not only set up in detail the facts from the record showing that the amounts claimed by said Horace G. Stone as counsel fees, even if allowable from the fund in court was exorbitant, but specifically setting forth the facts from the record showing that there had not been such compliance with the terms of the stipulation of November 6, 1901, as was required to be performed by the defendants as would entitle the defendants and their counsel to have such allowances from the fund in court. Said answer was verified by the affidavit of the counsel of the United States.

On April 1, 1908, a similar petition (Rec., Vol 1, p.

279) was filed by N. C. Sears, who claimed to be local counsel for O. M. Carter at Chicago, asking for $6,000 to which were attached similar affidavits.

On April 8, 1908, the United States filed its answer thereto (Rec., Vol. 1, p. 283) in which a similar defense was made to such allowance as was set up in the petition of H. G. Stone for fees.

There was no testimony taken by the said Stone or Sears or Carter on which complainant was afforded any opportunity to cross-examine said attorneys whose affidavits were attached as aforesaid as experts on fees.

An examination of the facts shown in the record as set forth in the answers of the United States to said petitions, will show that the value of the services as stated in said affidavits of said alleged experts, are based upon hypothetical statements of facts, not supported by the record.

There were also certain petitions and bills filed by H. G. Stone as solicitor for O. M. Carter, for payment out of the fund of certain expenses alleged to have been incurred under the stipulation of November 6, 1901, to the payment of which the United States filed answers and objections. (Rec., Vol. 1, pp. 274 and 287 and 290.)

(25)

On April 14, 1908, the said Circuit Court rendered its final decree (Rec., Vol. 1, p. 404) by which it was among other things decreed that there should be paid from the funds in the hands of the receiver:

To the International Audit Company, for services rendered the defendant, O. M. Carter, by Robert Nelson, as expert accountant and witness.....$1,000.00

To Lyman E. Cooley for services rendered the defendant as expert engineer and witness 1,600.00

To N. C. Sears, as fees for services as attorney of O. M. Carter at Chicago..... 5,000.00

To Horace G. Stone, for expense bills as attorney for O. M. Carter..... 2,251.31

To Horace G. Stone, as fees for services as chief counsel of O. M. Carter for 2,000 days at $30.00 per day 60,000.00

From which allowance there was to be deducted the $17,500.00 already received by said Stone.

(The said 2,000 days included every day except Saturdays from the date October 9, 1901, when O. M. Carter entered his appearance in said cause to the date of the decree, April 14, 1908, about six years and a half.)

By said decree of April 14, 1908 (Rec., Vol. 1, p. 407), paragraph 7, it was further decreed that:

> "The motion of the United States to have a provision, in the final decree in this cause, mak-

ing certain allowances aggregating $35,885.23, as stated in said motion, which have heretofore been paid out of the fund in the hands of the receiver for and on account of the defendant, O. M. Carter, as an allowance for his personal expenses, and for printing bills, counsel fees, and accountant's fees, together with the additional amounts by this decree directed to be paid out of the fund in court for counsel fees, and allowances to expert witnesses for the defense, aggregating $52,351.31 a charge first upon the assets which by the decree of March 21, 1908, in this cause were decreed to belong to Oberlin M. Carter, is denied.

And the said Oberlin M. Carter is decreed to have and receive from the receivers under this bill, and the auxiliary bills, the said assets which by the said decree of March 21, 1908, were decreed to belong to him, free from all costs and charges of the litigation, and free from any claim of the United States for the advances made or herein decreed to be made, for or on account of the said expense of said Carter or allowances to his counsel as aforesaid."

(26)

Thereafter the United States, on April 28, 1908 (Rec., vol. 1, p. 426), entered an appeal from said decrees of March 21, 1908, and April 14, 1908, to the Circuit Court of Appeals for the Seventh Circuit, which was duly allowed and supersedeas granted; and that with the entry of said appeal the United States filed in said Circuit Court various assignments of errors to the various matters complained of (Rec., vol. 1, p. 411).

And among the assignments of error so made and entered were the following (Rec., vol. 1, p. 419):

> "15) That the Court by its final decrees of March 21, 1908, and April 14, 1908, committed error in failing to hold that the defendants, I. S. Carter, L. D. Carter, and O. M. Carter, had not turned over to the receiver substantially all of the assets turned over to I. Stanton Carter and L. D. Carter by J. H. Paul, R. E. Westcott, and James Bragg, or their proceeds and reinvestments, except such as had been prior to the receivership *bona fide* paid out or pledged by them for attorneys' fees or as expenses in defense of Carter, or expended by them legitimately in the handling of said properties, or which had not prior to the agreement of November 6, 1901, been taken possession of by the receivers in said cause, and in not holding that the said defendants had not sufficiently complied with paragraph (9) of the agreement of November 6, 1901, referred to in said decrees of March 21, 1908, and April 14, 1908, to entitle them to claim the benefit of paragraphs (7) and (8) of said agreement; in this, that the said I. S. Carter and L. D. Carter did not file answers disclaiming any personal interest in the assets claimed by the Government, as provided in said agreement, but set up and claimed liens on said assets for salaries alleged to be due them by O. M. Carter to the amount of $22,500.00, and have contested for the same during the whole litigation, and have not accounted to the receiver or to the complainant for assets for which they were so accountable under said agreement to the amount of $28,960.76, of which $8,331.61 were received from J. H. Paul, R. E. Westcott, and James Bragg."

In the sixth and twelfth and eighth and thirteenth assignments of said assignments of error complainant therein assigned error on the failure of said Cir-

cuit Court to sustain complainant's exceptions to the master's report for allowing I. Stanton Carter's salary claim to the amount of $6,750.00 and L. D. Carter's salary claim to the amount of $12,916.66 to be set off against the proceeds of the said trust funds retained by them and not turned over to the receiver, and for failure of the said court to give to complainant a money judgment for the amounts so retained by them.

And in the seventeenth and eighteenth assignments of said assignments it was assigned as error that said Circuit Court had committed error in making said allowances in said final decrees from said funds in the hands of the receiver to said Oberlin M. Carter for expenses and to his counsel for fees, because: "Said defendants have not sufficiently complied with the terms of the said agreement of November 6, 1901, to entitle them or their counsel to be paid out of the fund in the hands of the receiver belonging to complainant," and "that the amount of said allowance in any event is excessive and exorbitant, considering the services rendered and the fact that said allowance together with the other allowances to be made under said agrement were to be made from the fund which was *to be accounted* for to the receiver, and the maximum amount which under any circumstances can be considered as having been accounted for to the receiver under said agreement did not exceed $135,971.77."

Oberlin M. Carter, Lorenzo D. Carter, I. Stanton Carter, Horace G. Stone, Nathaniel C. Sears, Lyman E. Cooley, and the International Audit Company also

entered a cross-appeal in said cause to the said Circuit Court of Appeals. (Rec., vol. 32, p. 13384.)

(27)

In said Circuit Court of Appeals for the Seventh Circuit, the said appeal and cross-appeal in said cause was heard, and on the 18th day of March, 1909, the said Circuit Court of Appeals on that day entered its opinion and decree in said cause (Rec., vol. 33, pp. 13407-13432), by which it was decreed as to all the assets which went into the hands of the said receiver for the Northern District of Illinois, as well as those which went into the hands of the receivers or were tied up on *mesne* process in the other districts, under complainant's said bills, that the same were the property of the United States and not the property of Oberlin M. Carter, and that no part thereof should be awarded to said Oberlin M. Carter (Rec., vol. 33, p. 13428). By said decree the said Circuit Court of Appeals disallowed the credit of $6,750,00 allowed by the master and by the said Circuit Court to I. Stanton Carter for salary, and directed that the decree of the said Circuit Court be corrected so as to award complainant a deficiency judgment of $18,204.18 against him for the proceeds of said trust fund traced into his hands and unaccounted for. (Rec., vol. 33, p. 13431.) By said decree the said Circuit Court of Appeals disallowed the credit of $12,916.66 allowed by the master and by said Circuit Court to L. D. Carter for salary, and directed so as to award complainant a deficiency

judgment of $7,577.04 against him for the proceeds of said trust fund traced into his hands and unaccounted for (Rec., vol. 33, pp. 13431 and 13436).

But the said Circuit Court of Appeals failed to take notice in its said opinion and decree of complainants' said fifteenth assignment of error, and of the fact that its aforesaid findings awarding complainants said deficiency judgments aggregating $25,781.22, for proceeds of said trust funds converted into cash by them, not accounted for by L. D. and I. S. Carter, and not delivered to the receiver, was a judicial determination of the fact that the said defendants had not even at the date of said decree complied with the terms of said stipulation of November 6, 1901, which required them to turn over forthwith all of said assets so claimed in said complainants' bill, and which required them to disclaim in their answers all personal interest in said assets; and that said Circuit Court of Appeals failed to notice the fact that even the $21,000.00 Kentucky Central bonds described and claimed in complainants' bill, and title to which by said agreement was to be disclaimed by L. D. Carter, had only been turned over to the receiver after a long contest before the master and before said Circuit Court on the personal claim of L. D. Carter asserted thereto; and so that the said Lorenzo D. Carter and I. Stanton Carter had after the agreement of November 6, 1901, not only not forthwith turned over to the receiver $46,781.22 assets which they were required to do by said stipula-

tion, and had not disclaimed all personal interest therein, but had, by themselves and by the said Horace G. Stone, their and O. M. Carter's counsel, contested for the possession and right of property therein as their own during the entire litigation, thereby putting complainant to great trouble, expense, and delays; also the said Circuit Court of Appeals by its said opinion and decree failed to notice the finding of the master (Rec., vol. 10, p. 5070) called to its attention, under complainants' said fifteenth assignment of error, that all of the said receipts by L. D. Carter and I. S. Carter of assets charged against them in the account stated by the master, with the exception of $21,529.15, were received from the said J. H. Paul, James Bragg, and R. E. Westcott, mentioned in the ninth paragraph of said stipulation of November 6, 1901.

Also the Circuit Court of Appeals failed to notice the said fifteenth assignment, which set forth:

> "That the said defendants had not sufficiently complied with paragraph 9 of the agreement of November 6, 1901, referred to in said decrees of March 21, 1908, and April 14, 1908, to entitle them to claim the benefit of paragraphs 7 and 8 of said agreement."

And the said opinion and decree erroneously set forth that

> "the only objection raised to either of the provisions for such counsel is that each is excessive. We are of the opinion, however, that no abuse of discretion appears in the liberal awards made by the decree within the purpose of the stipulation and that no other reviewable question arises under these assignments." (Rec., vol. 33, p. 13431.)

(28)

Afterwards, on the 25th day of May, 1909, the said United States entered an appeal from the said decree of the said Circuit Court of Appeals of March 18, 1909, in said cause, to the Supreme Court of the United States (Rec., vol. 33, p. 13441) and filed therewith its assignments of error (Rec., vol. 33, p. 13444), which appeal was duly allowed so as to operate as a supersedeas on May 26, 1909. (See vol. 33, pp. 13454, 13455.) Said assignment of error being hereto annexed and made a part of this brief.

(29)

The said appeal was duly perfected by the filing of a duly authenticated transcript of the said record in the said Supreme Court of the United States, and it appears from the said assignment of errors in said record that the whole question of the right of said Oberlin M. Carter and his counsel to have any allowances of fees made out of said assets in the hands of the receiver of said Circuit Court of the United States for the Northern District of Illinois or tied up in the hands of receivers or on *mesne* process in said other districts, under or by virtue of said stipulation of November 6, 1901, or otherwise, is now before the Supreme Court of the United States for its determination on the appeal.

A cross-appeal of Oberlin M. Carter *et al.* was also taken to this court, the record on which consisting

of only 29 pages was filed July 30, 1909, and docketed as No. 552.

(30)

This Court will also take judicial notice of a petition for a writ of prohibition and stay filed in this court by the United States on October 19, 1909, entitled, "Original No. 10 October Term, 1909. In the matter of the United States Petitioner," and of the proceedings thereon, which include the said petition, the answer of John B. Daish, attorney for O. M. Carter, the answer of Oberlin M. Carter, the answer of the Honorable Christian C. Kohlsaat, Judge thereto, and the orders of this court therein.

It appears from the averments of said petition that besides the said sum of $35,351.31 already paid out to Oberlin M. Carter and his counsel for expenses and attorneys' fees on interlocutory orders, and besides the said sum of $52,351.31 in addition which by the decree of said Circuit Court of April 14, 1908, was directed to be paid out on account for said Oberlin M. Carter for expenses, and for counsel fees in said cause up to April 14, 1908, that the said Horace G. Stone has notified counsel for the United States of his intention to claim and demand from said Circuit Court $60,000.00 or other large sum from the said funds for alleged services as chief counsel for O. M. Carter in said cause rendered in said Circuit Court of Appeals. Also that a petition of the said O. M. Carter is pending in said Circuit Court for an advance allowance of $5,000.00 on ac-

count of fees for the services of his new counsel claimed to have been already rendered on his cross-appeal in this court. And that the extent of the claim which will be asserted for the alleged services of said counsel in this court in said cause to final decree is yet undetermined.

And this court will in this connection take judicial notice of the order set forth in said petition for writ of prohibition and stay, page 40, which was on May 28, 1909, by the Honorable Christian C. Kohlsaat, Judge, in said Circuit Court, made after the entry of the appeal of the United States to this court by which over the objections of the United States for want of jurisdiction, the said judge in said order has adjudicated the right of said Oberlin M. Carter to have allowances out of said fund in court from time to time for services of his counsel in this cause in the Supreme Court of the United States.

It is true that in his answer to the writ the judge has disclaimed that he intended by said order to adjudicate said right, but the order speaks for itself —and gives to said Oberlin M. Carter the affirmative right "to apply to the court from time to time for an order on the receiver to pay the same out of the funds under the control of the court."

Whatever the intent of the judge himself, the order should not be left on the records in that form to be perhaps invoked by said O. M. Carter before some other judge in that court, as an adjudication of his right to have said allowances.

Indeed the court will take judicial notice that by the notice given by O. M. Carter of the new applica-

tion for such counsel fees to be made to that court on October 20, 1909, and the answers of said O. M. Carter and John B. Daish, his attorney, to the petition for prohibition, that they are already so invoking that order as such adjudication, and that by the subsequent orders of the said Circuit Court adjourning said hearing on the application until this court has disposed of the prohibition, that the said Circuit Court is entertaining jurisdiction thereof.

Argument.

INTENT OF THE STIPULATION OF NOV. 6, 1901.

To properly understand the stipulation of November 6, 1901, the facts existing at the time, which, as shown by the record, each party knew to be within the common knowledge, must be considered.

At the time of making the stipulation of November 6, 1901, it was known:

(a) That the Government had already tied up $288,346.92 of assets claimed by it to be part of the trust funds, in the hands of receivers and on mesne process on bills filed against O. M. Carter and his agents in districts other than the Northern District of Illinois. (See statement of facts, Paragraph 3.)

(b) That the appointment of the receiver had on return of rule nisi been made permanent *pendente lite* October 28, 1901. (See statement of facts, paragraph 3.)

(c) That the defendants I. Stanton Carter and L. D. Carter had filed answers to the Rule Nisi for contempt issued against them for failure to turn

over assets to the receiver appointed on the bill in the Northern District of Illinois, denying the possession, custody or control by them of any of the assets claimed by the complainant in its bill. And that said rule for contempt stood on the calendar of the court for hearing. (See statement of facts, Paragraph 3.)

That the Government had already October 5, 1901, come into possession of an original joint receipt given to J. H. Paul, the agent of O. M. Carter, in New York on May 23, 1900, signed by D. P. Carter and I. Stanton Carter, brothers of O. M. Carter, for assets claimed to be a part of the trust fund aggregating at par values $349,475.00. (See receipt and affidavit of J. H. Paul thereto, Rec., Vol. 10, p. 4901-2, also admission, Rec. Vol. 10, p. 4716.) And for the fact that defendants knew on October 28, 1901, that the Government had obtained possession of that receipt see (Rec., Vol. 1, p. 247).

The defendants also knew that the complainants had already tied up in the hands of a receiver in the district of West Virginia on the auxiliary bill filed there against O. M. Carter, D. P. Carter, *et al.*, all but $161,275.00 of the assets described in the said joint receipt given by I. Stanton Carter and D. P. Carter to J. H. Paul.

The defendants therefore knew that on the hearing for the rule for contempt the complainant was in a position to make out a *prima facie* case tracing at least $161,275.00 of the trust fund claimed into the possession of I. Stanton Carter, as received from J. H. Paul, for which he would be bound to ac-

count and turn over to the receiver on the trial of said rule for contempt then on the calendar of the court.

The defendants also then knew from the averments of the bill (Rec., Vol. 1, pp. 30-31-32) that complainant had possession of the details of the rents received by I. S. Carter and L. D. Carter from James F. Bragg, Carter's agent in New York, and also knew of the conversion by L. D. Carter (the uncle) into money of the securities forming part of said $161,275.00 specified in the receipt of May 23, 1900, to J. H. Paul, and which had not then yet been tied up. And they knew L. D. Carter would be forced to account for said proceeds on said contempt proceedings.

It is in the light of these facts that the stipulation of November 6, 1901, must be contemplated.

IMPORTANT PROVISIONS OF THE STIPULATION.

(1) After referring to the suits on the similar bills pending in the six judicial districts, paragraph (1) of the stipulation provided for making the case pending in the Northern District of Illinois a test case, which was to be tried first.

It recites in effect that there was a common issue between the United States and Oberlin M. Carter in each of six suits, "as to the fraudulent diversion of funds intrusted to him (Carter) as a disbursing officer, into the assets as charged in complainant's bills pending in the several districts."

It recites that said issue "shall be brought to final decree first in the Circuit Court of the United

States for the Northern District of Illinois, and the final decree of that court, unless reversed by the appropriate Appellate Court on appeal, shall be conclusive on all questions determined therein and shall be made effective by appropriate decrees on the bills in the other districts if deemed necessary by either party."

It will be seen therefore that that paragraph goes no further than to make the suit pending in the Northern District of Illinois a test case—and was not a consolidation of the cases in the ordinary sense of the term. It recognized the fact, however, that the determination in the one case of Carter's fraud and of the diversion of the trust moneys as a whole and the investments of the same by him, would practically dispose of the other cases, which differed each from the other only in respect that a part of the investments were traced to and tied up in one district and part in another.

(2) The fundamental provision of the stipulation is contained in paragraph 2, which provides in substance that all the assets claimed by the Government in its said bills, as a part of the trust fund, and which had been traced or which might be traced into the possession, custody or control of the defendants, and which had not been *bona fide* disposed of by them, and therefore beyond their control, "shall be forthwith by the said defendants turned over to the receiver appointed in this cause."

This provision was simply a provision that the defendants should do what the court had already by order required them to do.

There was an exception made in that clause in the case of 1 Kentucky Central bond and 1 Michigan Telephone bond. The question of whether those two bonds had been purchased with the trust fund or with I. S. Carter's private fund being left for the court to decide before the defendant I. S. Carter should be required to deliver them up to the receiver.

It will be observed that that clause in no way was intended to determine the right of ownership of the assets required to be turned over to the receiver, and was intended solely for the purpose of avoiding so far as complainant was concerned the litigation delays and expense incident to forcing the defendants to deliver up to the receiver the assets still in their hands, and to make certain that all of the assets traced into the hands of I. S. Carter and L. D. Carter should not be made way with or otherwise placed out of their power to produce while the fight for possession was going on.

(3) It will be observed that L. D. Carter and I. S. Carter, in their answers to the rule to show cause for contempt had also on October 21, 1901, raised the question of constitutional exemption from disclosing assets by which disclosure if they had any assets it was claimed they would criminate themselves. (Rec., Vol. 1, pp. 113 and 116.)

In paragraph 3 of the stipulation an exemption was given defendants from further criminal prosecution by reason of the disclosure of the assets, except on a charge of perjury committed in the case.

This exemption conforms to that given by Section 860 U. S. Revised Statutes. But undoubtedly when the stipulation was approved by the court as it was, it exempted the defendants I. S. and L. D. Carter from having their disclosure of assets which they had previously denied having, used against them on the contempt proceedings as a basis of criminal punishment.

This was the whole intent of the provision of the 3rd paragraph of the stipulation as to disclosure by the defendants. It was a clause put in for the benefit of the defendants for their protection. It was never the intention of the United States to call the said O. M. Carter, I. S. Carter or L. D. Carter as witnesses for complainant, and they never were so called.

The order of reference to the master (Rec., Vol. 1, p. 148) on the accounting of I. S. and L. D. Carter, which followed the stipulation, provided only that the master should "afford them an opportunity to appear before him and to properly account if they can for such assets as should be so accounted for to the receiver by them."

The Government took the burden of tracing the assets into their hands, and when that was done the burden was shifted to them to disclose the disposition they had made of such of said assets as they had not turned over to the receiver so as to show that the delivery to the receiver was impossible because the assets had previously passed out of their possession, custody or control.

(4) Paragraph 4 of the stipulation was intended to reduce the question of title and right to all the assets in controversy to a question of title and right in the United States or to the title and right in Oberlin M. Carter, and to eliminate any and every claim of I. S. and L. D. Carter thereto from the litigation, with the exception of the claim of I. S. Carter to the two bonds, the determination of which by the court was provided for as hereinbefore stated.

The specific reference to the Eighth avenue, New York, property and Orange, N. J., property was made because the title to those properties had been conveyed by deeds from O. M. Carter to L. D. Carter and I. S. Carter. (See averments in bill, Rec., Vol. 1, p. 40, and answer of L. D. Carter, Rec., Vol. 1, p. 140.) The provision of Clause 4 of the stipulation, however, required that L. D. Carter and I. S. Carter should "file answers disclaiming any personal interest" not only in the Eighth avenue, N. Y., and Orange, N. J., properties, but in "the aforesaid assets in this litigation."

While their answers disclaimed as to the Eighth avenue and Orange properties, they did not so disclaim as to all the other assets, but as we have already seen L. D. Carter set up in his answer a personal claim on $21,000 Kentucky Central bonds, claimed by the Government in its bill as part of the trust fund, and also in their subsequent defenses before the master, L. D. and I. S. Carter set up personal claims for salaries alleged to be due them by O. M. Carter, as setoffs against $22,500.00 of said trust funds which had been withheld by them from the receiver, and which to this day has not been

turned over to the receiver or other disposition of it shown, and which money by the judgment of the Circuit Court of Appeals disallowing said salary claims and awarding money judgments to the United States against I. S. and L. D. Carter aggregating $25,781.22 we must presume is still in their possession and custody to this day.

It may be suggested for the defendants that the stipulation of I. S. and L. D. Carter to disclaim in their answers, will in a court of equity be treated as such a disclaimer in their answers, although the answers not only do not disclaim but in fact set up title to a large part of the assets.

This contention, however, overlooks the point at issue, as to the compliance of defendants with their part of the stipulation. One of the main inducements for the complainant making the stipulation, was that it was to eliminate a contest with I. S. and L. D. Carter over any right of property in the assets in controversy and thus save long delays, trouble and expense to the Government.

If they had so disclaimed in their answers, neither the master, nor the Circuit Court, would have allowed them, by proof to set up personal claims for salaries or otherwise against the proceeds of the trust funds in their hands. The Government would have been relieved from putting in evidence, as it did, to show that the said L. D. and I. S. Carter came into possession of said properties with full notice of the Government's claims thereto and that they were not *bona fide* purchasers for value without notice. Undoubtedly the court should on the

hearing on the merits treat said agreement to disclaim so far as it affects the right of the United States to have the assets, as having been actually made in the answers, but unfortunately neither the master nor the Circuit Court so treated it, and it was left for the Circuit Court of Appeals to apply the principle.

Actual disclaimer in the answers would have saved the Government the delays, cost and expenses of all that litigation, and the $25,781.22 for which the Circuit Court of Appeals has given the United States judgment would probably be in the hands of the receiver now, instead of in the pockets of I. S. and L. D. Carter.

As will presently be seen Horace G. Stone has actually been paid out of the trust fund for making that contest.

While a court of equity will for certain purposes treat an agreement to make a deed, as a deed in a suit between parties and privies, and so as to make a party perform his agreement, the failure of such party to make the deed at the time he agreed to make it, may be fraught with serious consequences to his own rights which he might otherwise have had under the agreement.

(5) Paragraph 5 of the stipulation provided for the dismissal of demurrers and exceptions by Carter and the prompt filing of his answer to the bill.

(6) Clause 6 of the stipulation provided for the right of Carter to inspect books and papers, etc.

(7) Paragraph 7 provided:

> "From said fund *to be accounted for to the receiver,* the sum of $5,000 shall be left in the hands of H. G. Stone, chief counsel of Oberlin M. Carter, from which to compensate and cover the expense of employment of local counsel in any of the districts in which local counsel have been or may be employed in any branch of the case."

It will be observed that that provision was that the $5,000 was to come out of the fund "to be accounted for to the receiver."

There were no assets at that time in the possession of the receiver of the court in the Northern District of Illinois, and no provision was made for its coming out of the funds which were already in the hands of the receivers of other districts.

(8) Paragraph 8 provided that:

> "From said fund *to be accounted for to the receiver,* there shall be paid:
>
> (a) The fees, traveling expenses and other expenses of Oberlin M. Carter's chief counsel and of his attorney at Chicago, to be fixed and allowed by the court.
>
> The importance of the case, and the means and methods taken to bring the same to a just determination speedily and not the length to which the proceedings may be protracted to be considered as the elements of merit in fixing such fees."

It will be remembered that these allowances were also limited to be made "from the fund *to be accounted to the receiver.*"

> "(b) Also the fee of his attorney for representing Carter in case of any criminal trial in Georgia, if Carter should be placed on trial there prior to the final disposition of this case."

That provision is unimportant for the reason that although Carter was then jointly indicted as a conspirator with Greene and Gaynor in Georgia, he had already been convicted by court-martial for the same offenses, and the Government had no intention then to put him on trial, and did not in fact put him on trial on said indictments.

> "(c) The expenses of taking evidence on behalf of said Carter, including the services of an accountant at not exceeding ten dollars per day for his services when needed and actually employed plus his expenses, if any."

It will be observed that this clause limited the expenses of taking evidence on behalf of O. M. Carter and provided for no payment of services of experts except that of one accountant.

> "(d) And if before the final determination of this cause the said Oberlin M. Carter shall be liberated from prison he shall be allowed his reasonable personal expenses incurred by him while engaged in work in this cause, including the taking of evidence, but with no compensation for his time, such expenses to be determined by the court and paid out of the monies in court."

Then follows this clause:

> "Payments and allowances under paragraph numbered '(8)' of this agreement to be determined by the court from time to time on petition with the right of the United States to contest the same as unreasonable or that any expense was not incurred as stated."

It is, and was the contention of counsel for the United States that payments and allowances under paragraph "(8)" which were referred to in this clause as to be determined by the court "from time to time," were those expenses and disbursements

which would be completed from time to time, such as, disbursements for traveling expenses of his counsel (Chicago) (Clause a) when incurred. "The fee" of his attorney in the Georgia case if tried (Clause b), after he had completed the trial; the expense of taking evidence on behalf of Carter in the civil case (Clause c) as, and when it should have been incurred. The reasonable personal expenses of O. M. Carter (Clause d) while at work in the cause, including the time he was engaged in court while the evidence was being taken, which were to be "allowed" to him by the court, when and as the said expenses were incurred.

It was and is the contention of counsel of the United States that said agreement never contemplated that the court should make allowances of fees to Carter's chief counsel and his local attorney at Chicago, from time to time *prior to the determination* of the cause, and prior to the time that the court should determine, that the defendants had so complied with the provisions of Clause "9" of the stipulation (which will be referred to directly) a compliance with which was made a prerequisite to the making of any allowances under Clause "(8)".

The last part of clause (a) shows that the size of the allowances of fees to such chief counsel and local counsel at Chicago, were to be fixed by elements of merit, *which took in the termination* of the cause.

This objection among others was made by the Government on the very first occasion upon which such advance allowances on account of attorneys'

fees were applied for by Carter's counsel (Rec., Vol. 1, p. 176), and the Government has never waived that contention, although it was repeatedly overruled by Judge Kohlsaat as heretofore pointed out in the statement of facts.

Whether Judge Kohlsaat was right in that is not now material. He did make such allowances to the extent of $17,500 to H. G. Stone in advance of the determination of the question of compliance by defendants, and in advance of the determination of the cause on the merits. That is an accomplished fact and the complainants are not trying to get that money back from Mr. Stone.

(9) Paragraph "(9)" of the stipulation is as follows:

> "The assent of the United States to paragraphs numbered '(1,)' '(7)' and '(8)' of this agreement, is predicated upon the understanding that the said defendants will turn over to the receiver at least substantially all of the assets turned over to I. Stanton Carter, and L. D. Carter, by J. H. Paul and R. E. Westcott and James Bragg, or their proceeds and reinvestments, except such as has been, prior to the receivership, *bona fide* paid out or pledged by them for attorney's fees or as expenses in defense of Carter, or expended by them legitimately in the handling of said properties, or which has not already been taken possession by receivers in this cause."

It will be observed that the provisions of paragraph "(9)" of the stipulation were very liberal to O. M. Carter and his counsel.

The making of said allowances provided for by

paragraphs "(7)" and "(8)" were not made dependent upon O. M. Carter's turning over all the assets which should be traced to him, nor was it predicated upon I. S. and L. D. Carter's turning over all the trust assets which might be traced to them, although by paragraph "(2)" of the stipulation they were required to turn over all such assets in their power, custody and control. But it was predicated upon their turning over to the receiver substantially all of such assets or their proceeds which had been turned over to them by three of the agents of O. M. Carter in New York, J. H. Paul and R. E. Westcott (the son of Robert F. Westcott) and James Bragg, except such of said assets so received as had already been taken possession of by the receivers in the other districts, or *bona fide* paid out or pledged by them for attorney's fees, or as expenses in defense of Carter or expended by them legitimately in the handling of said properties.

It will be observed that there was no room there for the holding back proceeds of said trust funds, for personal compensation or salaries of I. S. or I. D. Carter.

Nor were the allowances to be predicated upon any ability or inabiilty of I. S. or L. D. Carter to turn over said assets received from those agents; the only credits allowed under that clause were for actual expenditures made in the defense of Carter, or in handling the assets or paid out or pledged for attorneys' fees.

If I. S. and L. D. Carter could have shown absolutely that the entire amount of the said assets had

been wasted by them in speculation on their own account so that they could not possibly have turned anything over to the receiver, it would have been a compliance with paragraph "(2)" of the stipulation, because they would have turned over all the assets in their power, custody and control. But it would not have put the right to allowances in paragraphs "(7)" and "(8)" in operation, because these allowances were predicated upon the ability of I. S. and L. D. Carter to turn over substantially all of the assets received from J. H. Paul, R. E. Westcott and James F. Bragg except such as had been legitimately expended, paid out or pledged for specific purposes.

It is shown by the decree of the Circuit Court of Appeals (See statement of facts, paragraph 7) awarding the United States money judgments against I. S. and L. D. Carter aggregating $25,781.22, for securities converted into money by them and withheld by them from the receiver, all of which was part of the trust fund, to be accounted for under Clause "(2)" of the stipulation, and all of which with the exception of $21,529.15 came into the hands of I. S. and L. D. Carter from said Paul, Westcott and Bragg, that they are to this day still short in turning over to the receiver $4,252.07 of said trust fund received from said Paul, Westcott and Bragg, and $21,529.15 of said trust fund received from other sources, on the facts as found by the Circuit Court of Appeals.

But it is not a question alone of what they are still short in turning over. It is plainly implied in paragraph "(9)" that the turning over of assets re-

ceived by L. D. and I. S. Carter from said Paul, Westcott and Bragg was a part of the turning over "forthwith" of all the trust assets claimed by the United States provided for by Clause "(2)" of the stipulation.

It will surely not be contended that if the defendants had not turned over any of the assets at all but had resisted such turning over to the end of the litigation, and then under final process had turned over said assets to the receiver that such "turning over" would have been the "turning over" contemplated by Clause "(9)" which was to entitle the defense to have allowances made. The very consideration to the Government for the concession of the allowances, was to relieve it from the cost, expense, risk and delays, involved in the fight to force the assets, known to have been received by them, from their hands into the hands of the receiver; which by the terms of the stipulation I. S. and L. D. Carter were to "forthwith" turn over to the receiver, and to file answers disclaiming all personal claims thereon.

The withholding by L. D. Carter of the $21,000 Kentucky Central bonds purchased with part of the proceeds of the trust funds received from said Paul, Westcott and Bragg, and specifically claimed by the Government in its bill, and the assertion of L. D. Carter of ownership thereof (later disproved) by which the Government was forced to a long contest before the master and before the court, before L. D. Carter was forced at the point of the judicial bayonet to turn over said $21,000 of Kentucky Central bonds; and the withholding by I. S. Carter and L. D. Carter

of $25,781.22 cash proceeds in their hands to this day, under personal claims for salary set-offs, and the long contest which the United States was forced to make to overcome the same, before the master, before the Circuit Court, and before the Circuit Court of Appeals, shows that there has been no such compliance by defendants with Clause "(9)" as entitles them to have allowances made.

Horace G. Stone, chief counsel for O. M. Carter and for L. D. Carter and I. S. Carter, made the fight before the master and before the Circuit Court for L. D. Carter and I. S. Carter, on their assertion of personal claims to the $25,781.22 cash proceeds withheld by them and to the $21,000 Kentucky Central bonds withheld by them, and he signed the stipulation of November 6, 1901, for them. He therefore made that breach of the stipulation, at his own and O. M. Carter's peril, and with full notice of the consequences as they affect his and O. M. Carter's right to have such allowances made from the trust fund.

THE APPELLEES ON THE QUESTION OF COMPLIANCE.

We have not been favored yet with the brief of the appellees on the appeal of the Government from the allowances. But in the answer of John B. Daish, attorney for O. M. Carter to the application of the Government for the writ of prohibition, the following contentions are made:

First Excuse.

It is admitted in said answer (page 8) that on the face of the finding of the Circuit Court of Appeals the defendants I. S. and L. D. Carter are short in accounting for said trust fund to the receiver to this day, the sum of $4,252.07 received by them from said Paul, Westcott and Bragg, and for $21,529.15 of said trust fund received from other sources. The answer (page 9) then proceeds to go behind said finding of the Circuit Court of Appeals as follows:

> "The Circuit Court of Appeals in its decrees in said causes (Rec., 13433) failed to give the full credit for salary, which is admitted just by complainant, and described in complainant's exception to the master's report as follows: 'to that extent, to-wit, 23 months at $150 per month, $3,450, we concede that I. Stanton Carter would be entitled to credit, *under the second* clause of the agreement of November 6, 1901, as being so much of the assets actually disposed of by him prior to the receivership and therefore beyond his control' (Rec., 320-1);
>
> Thus reducing the alleged shortage to $802.01."

The quotation is from complainant's exception to the master's report (Rec., Vol. 1, pp. 320-1) and omits the language immediately preceding as fol lows:

> "I. Stanton Carter testified that he has practically no property of his own (Testimony before the master, page 254).
>
> It is not an unreasonable presumption that he did spend for his private and family use the amount (of the trust fund $150 per month) he claims to have spent, and so much of it as he has spent is out of his power to replace."

Then follows the language quoted followed by this:

> "This concession does not depend on the validity of the agreement for salary, or the legality of the payment, but simply upon the fact that the money had been paid out and consumed prior to the receivership, and therefore it is impossible to make him replace it."

It will be noted that the concession is that he is entitled to credit under Clause "(2)" of the stipulation as for assets which he was excused from turning over to the receiver because paid out prior to the receivership. But not that he was entitled to credit under Clause "(9)" of the stipulation, which made the right to allowances depend upon the ability of the defendants to turn over substantially all of the assets received from Paul, Westcott and Bragg

> "except such as has been prior to the receivership *bona fide* paid out or pledged by them for attorneys' fees or as expenses in defense of Carter or expended by them legitimately in the handling of said properties, or which has already been taken possession of by the receivers in this cause."

It surely cannot be contended that the spending of the $3,450 for his own family use came within the above specified exceptions. Therefore it is not a credit to which he is entitled under Clause "(9)". Moreover if I. S. Carter spent that portion of the trust fund, on his own family account, even though the court could not make him turn it over to the receiver, it was right that it should be included in the money judgment awarded to complainant, and the Circuit Court of Appeals was right in so including it.

Paragraph "(3)" of the stipulation expressly provided that:

> "And nothing in this agreement shall be construed as affecting the right of the government if any it has to recover any part of said assets disposed of by said defendants and not turned over to the receiver."

They, appellee's counsel, overlook the fact that the order of reference to the master (Rec., Vol. 1, p. 148) requires him to report separately upon the compliance or non-compliance of the defendants with the provisions of Clause "(2)" and separately under the provisions of Clause "(9)" of the stipulation, and overlooks the fact that the concession referred to in the exception quoted specifically preserves and insists on the distinction necessary to be made as affecting the rights of the parties under the stipulation. We insist that the defendants are not entitled to go behind the Circuit Court of Appeals judgment on that $3,450 dissipated in his own use by I. S. Carter. Besides, if he was unable to replace it out of his private funds, he can not be held to be totally disabled when he is holding back $18,204.18 of the trust fund received from other sources.

Second Excuse.

Again it is contended in said answer of John B. Daish, attorney for O. M. Carter, to the application for prohibition, and presumably will be contended here, as an excuse for the failure to turn over the $21,000 Kentucky Central bonds and the moneys withheld, that (answer p. 8):

> "Oberlin M. Carter being a joint party to the stipulation of November 6, 1901, delivered

without any delay $34,600 of money not called for by the said stipulation (stated in the petition, p. 21, as actual value $37,114.75) an amount greater than sufficient to cover any deficiency claimed."

This contention is not based upon the finding of the said Circuit Court of Appeals, but is based upon the finding of the said Circuit Court in the decree of March 21, 1908, Clause 2 (Rec., Vol. 1, p. 390), which holds that $37,114.75 (at cost and par values) of the securities specified therein as being in the hands of the several receivers, were not purchased with the trust funds, but with the private funds of Robert F. Westcott and Oberlin M. Carter,—which clause of said decree was reversed by the Circuit Court of Appeals, which held (Rec., Vol. 33, p. 13428), that they were a part of the trust funds and belonged to the United States.

If, however, the Circuit Court was right, that finding would not affect the issue on the point now under consideration.

Of the securities specified in said clause 2 of the decree of the Circuit Court of March 21, 1908, the complainant had claimed and specified by serial number and description, the following as being part of the trust fund belonging to complainant:

5 Ches. & Ohio 5%, purchased Feb. 11, 1893, which cost	$ 5,275.00

(Exhibit E to bill sheet 2.)

5 Chicago & St. P., M. & Omaha 6% bonds, purchased April 11, 1893, which cost...	6,143.75
5 Chicago, St. P., M. & Omaha 6% bonds, purchased April 28, 1893,	6,102.25

(Exhibit E to bill sheet 3.)

5 Ches. & Ohio 4½% bonds, purchased April 11, 1900, by J. H. Paul with the proceeds of other securities claimed in the bill as shown by Booth Exhibit F, sheet 6, Rec., Vol. 28 of Exhibits, which cost	4,993.75
15 shares Savannah Lighterage & Transfer stock, was claimed as a part of the trust fund in the auxiliary bill filed in So. Dist. of Ga. (See Rec., Vol. 19, p. 9494.) Par value	1,500.00
100 shares Savannah Towboat stock, par value $100 (claimed in the bill Exhibit thereto E, sheets 1, 2 and 12)	10,000.00
5 shares Savannah Cotton Mill stock (claimed in the bill Exhibit E thereto sheet 1)	500.00

The only items specified in clause "(2)" of the decree of March 21, 1908, which were not claimed in the bill as part of the trust fund were the following:

1 share of Greenwich Park Association, par value	$ 100.00
25 shares Seaboard Company stock, par value	2,500.00

These two items turned over to the receiver in the Northern District of Illinois by O. M. Carter, not asked for, were and had been for years worthless, the Seaboard Company was defunct. (Testimony of Carter, Rec., Vol. 8, pp. 4147-8.)

Again all of the above described securities specified in Clause 2 of the decree of March 21, 1908, are included in the receipt of May 23, 1900, given for said securities by I. S. Carter and J. H. Paul. (Rec., Vol. 10, p. 4902.)

From which it will be seen that the securities mentioned in Clause 2, were among those claimed by the Government in its bills, and required by the stipulation to be turned over to the receiver by the defendants to abide the final decree, if they had not already been turned over, and therefore the turning of those over would not excuse the failure to turn over the others not turned over. As a matter of fact, however, the 5 Chesapeake & Ohio 5 per cent. bonds, and the 10 Chicago, St. Paul, Minneapolis & Omaha bonds had been taken possession of by the receiver of the United States Circuit Court for West Virginia on September 16, 1901, prior to the agreement of November 6, 1901, and were not turned over by O. M. Carter. (Exhibit 432, Parsons, Rec. of Exhibits, Vol. 28.)

It cannot logically be seen how even if the Circuit Court was right and the Circuit Court of Appeals wrong as to the securities specified in Clause 2, being a part of the trust fund, it could excuse the defendants from turning over those assets which admittedly are part of the trust fund, and withheld by them.

The Third Excuse.

"SUBSTANTIALLY ALL."

In the answer (page 8) of John B. Daish, attorney for O. M. Carter, to the petition for prohibition, it is stated:

> "The master required them (L. D. Carter and I. S. Carter) to establish their credits according to the strict rules of evidence, although they were charged in the bill with criminal fraud as to all such matters."

Presumably the same contention will be presented on this appeal. How baseless is this contention will be seen by the following facts shown in the record:

L. D. Carter filed before the master an omnibus claim for credit of $5,000.00 for personal expenses, claimed to have been made on trips for account of O. M. Carter, without any statement of items, dates, or description. He supported it solely by his own testimony without vouchers or other documentary evidence, and which was equally devoid of particulars.

The master found that the proof showed that $1,445.57 was a liberal allowance for expenses for the trips proved, but gave him credit for $3,000 against the trust assets retained by him, on the ground as stated that:

> "Acting upon the assumption that traveling expenses usually largely overrun any estimate made in advance, the master thinks that $3,000 would be a liberal allowance and recommends that L. D. Carter be allowed a credit for his personal expenses under this item for $3,000."

Complainant excepted to said finding (Rec., Vol. 1, pp. 339-340) by which the proved credit was doubled by guess, as violating the principles of accounting as stated by this court as follows:

> "It is for the party claiming to be entitled to establish just what amount he is properly entitled to, and it is not made the duty of the court or its officers to arbitrarily guess at the amount."
>
> *Spalding* v. *Mason*, 161 U. S., 394, 392.
> *Hardy* v. *Handy*, 11 Wheat., 103-127.

Also I. Stanton Carter filed before the master an omnibus claim for credit of $8,000 for personal expenses, claimed to have been made on trips for account of O. M. Carter, without any statement of items, dates or description. He supported it solely by his own testimony without vouchers or other documentary evidence, and which was equally devoid of particulars.

The master found as to some of the trips claimed to have been made:

> "That I. S. Carter's statement that he was going out there to make these investments is utterly discredited, aside from the fact that he offers no competent proof to support the claim."

The master, however, found that the proof showed that $2,180.73 was a liberal allowance for the trips actually proved, but allowed $4,000 on the ground stated as follows:

> "As general experience proves that the actual expenses of traveling usually amount to about double what is estimated in advance as a liberal allowance, and in view of the fact that the defendant I. S. Carter, may have made the

> alleged New Mexico trip, and possibly even others, the master would recommend that he be given credit on his claim for expenses paid prior to September 1, 1901, for $4,000."

This doubling of the credit proved, was also excepted to by complainant. (Rec., Vol. 1, p. 323 *et seq.*)

The exceptions of complainant to these erroneous or "liberal" increase of credits aggregating $3,373.70 in excess of the credits actually proved, were unnoticed in the final decree of the Circuit Court, and were made the subject of the 7th and 11th assignments of error of the United States filed on appeal to the Circuit Court of Appeals. (Rec., Vol. 1, pp. 415-417.) That court overruled these particular exceptions with the statement that:

> "Upon the objections raised to items of expense allowed, we believe the findings of the master, approved by the trial court, should not be disturbed." (Rec., Vol. 33, p. 13431.)

It is the contention of the United States that this doubling of credits over the amounts of credit proved raises a question of law, and not one of fact, and ought to be reversed on principle. If reversed it would add $3,373.70 to the money judgment of $25,781.22 rendered by the Circuit Court of Appeals against I. S. and L. D. Carter for assets converted into money by them and unaccounted for, and make the assets received by them from Paul, Westcott and Bragg still unaccounted for and withheld from the receiver $7,652.77 to this day.

It is true that the United States has appealed from the decrees of the Circuit Court of Appeals only on the allowances, on the ground that the de-

fendants had not complied with their part of the stipulation, and on account of their exorbitant character. But O. M. Carter and L. D. and I. S. Carter have appealed the whole case on the merits and the correction of such an error of law, committed by the Circuit Court of Appeals, affecting the matter of the allowances, would seem to be proper.

If, however, it cannot be corrected the above facts show that the defendants have already been given by the Circuit Court of Appeals the advantage of any difference which may exist between "all" and "substantially all," without further cutting down of the $25,781.22 money judgment given by that court.

THE FOURTH EXCUSE ALLEGED FOR NON-COMPLIANCE.

It is stated in the said answer (page 9) John B. Daish, attorney for O. M. Carter, that:

> "Oberlin M. Carter has fully complied not only with the letter but the spirit of said stipulation. Therefore even if other parties may not have done so, the said Oberlin M. Carter ought not to suffer on any such account."

To this suggestion, which we presume will be urged on this appeal, the reply is that the stipulation clause "(9)" gives the right to the allowances only on condition that the said assets specified delivered to I. S. and L. D. Carter were turned over to the receiver by the "defendants," and it makes no difference whether the failure to turn over is to be laid to the door of the one or the other.

However, Oberlin M. Carter furnished his own

affidavit (Rec. Vol. 10, p. 5034, offered p. 4994) in support of I. S. Carter's efforts to hold back $7,500 of the trust assets for salary set-off. And H. G. Stone, the common council for O. M. Carter, L. D. Carter and I. S. Carter, made the fight before the master, and before the Circuit Court as well for the retention of the $21,000 Ky. Central bonds, as for the retention by them of the amount held back by them on said salary allowances, and the fight was made in the name of all of the defendants.

THE APPELLEES' CONTENTION AS TO ESTOPPEL.

It is contended by the appellees (O. M. Carter *et al.*) that the orders made *pendente lite* by Judge Kohlsaat by which the $17,500 was advanced out of the funds in the hands of the receiver, to Horace G. Stone as chief counsel for O. M. Carter and by which $4,250 was paid to him for fees of Carter's local counsel in other districts, being orders to pay out money could each and all have been appealed by the United States, and in that respect were final decrees. That the time for appealing said orders had expired before the Circuit Court entered its final decree of April 14, 1908, and that therefore the United States was estopped from denying at the time of said final decree that the defendants had fully complied with clause "(9)" of the stipulation, and therefore estopped from appealing from the ad-

ditional allowances aggregating $52,351.31 made to the said O. M. Carter and his attorney in said final decree of April 14, 1908.

Reply:

A reference to our statements of fact and citations to the record therefrom, will show that all the aforesaid allowances made prior to April 14, 1908, were made subsequent to the interlocutory decree of January 4, 1904. That by said last mentioned decree the court reserved for final decree on the merits the questions raised and made in complainant's exceptions as to the non-compliance of defendants with the conditions upon which allowances were to be made, and that those exceptions stood, not passed upon until the decree of April 14, 1908.

Also that complainant by formal answers to the applications for such fees continually set up the pendency of said exceptions undisposed of, and insisted that there had been no such compliance by the defendants.

Certainly there was no waiver of the complainant of its contention in that respect, unless as contended by the appellees failure to treat the orders as final decrees and to appeal them as such operated as an estoppel against such contention.

That the Circuit Court did not so consider it, is shown by the very first allowance of $6,000 of February 15, 1904, to H. G. Stone, it recites that it was made

> "Without prejudice as to the proper construction of said agreement on future similar applications."

Similar reservations (see statement of facts) were either expressly made or were implied in all the subsequent allowances made to said counsel.

It is contended, however, by the appellees that whether the court intended to reserve the question of compliance or non-compliance by defendants for final decree on the merits or not, that the payment of the advance made it a final adjudication by operation of law.

In support of this contention it is stated in the answer (page 5) of Oberlin M. Carter to the application for prohibition and stay, as follows:

> "It is elementary law that a final decree regarding the first installment on a contract is conclusive between the parties, as to the validity or invalidity of the contract. *Wilson* v. *Dean*, 121 U. S., 525-534. The first installment on the contract of November 6, 1901, was paid February 15, 1904, the order stating counsel for the United States not resisting."

But the said answer of Carter omits to state that there was an express reservation that the said order was merely an advance, without prejudice to the contentions of the United States as we have seen.

To constitute an estoppel:

> "It must appear either upon the face of the record or by extrinsic evidence that the precise question was raised and determined in the former suit."
>
> *Cromwell* v. *Sac Co.*, 94 U. S., 351.

In that case the court said:

> "Various considerations other than the actual merits, may govern a party in bringing forward

grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation and his own situation at the time.

A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction."

Cromwell v. *Sac Co.*, 94 U. S., 356.

See, also:

Davis v. *Brown*, 94 U. S., 423.
Keokuk, etc., v. *Missouri*, 152 U. S., 301.
Wilmington, etc. .v *Alsbrook* 146 U. S., 279.
Nesbit v. *Independent Dist.*, 144 U. S., 610.
Roberts v. *Northern P. R. Co.*, 158 U. S., 15.

"When two suits, though seeking the same relief, rest upon a different state of facts, the adjudication in the one constitutes no bar to the recovery in the other."

Mobile Co. v. *Kimball*, 102 U. S., 691.

"Where the court has required complainants to proceed upon one only of two causes or grounds, for relief alleged in the complainant, the court left the other cause open for future suit."

Stark v. *Starr*, 94 U. S., 477.

In the case at bar, the court refused to pass upon the exceptions of complainant and the supporting evidence showing that the defendants had not complied with their part of the stipulation, but reserved

that for determination on the merits for final decree, and made the payments as advances, under a supposed right to do so, *pendente lite*. On the principles above stated there can be no estoppel.

It is true that the Government might have appealed those orders as they disposed of part of the money in controversy finally. But the expense attending such appeals, and the difficulty of taking up to a higher court the cause piece meal, deterred the Government from so doing.

Those orders were fully executed and the Government may not be able to reverse them, and accepts them as final so far as it may affect the rights of the parties to whom the payments were made.

But the right still remained to have such payments for account of O. M. Carter out of the fund, adjusted between the United States and Carter and to have a money judgment against him therefor, as the motion of the United States (Rec. Vol. 1, p. 316) requested the Circuit Court to do in its final decree.

The only order made by consent for payment out of any of the fund which went into the hands of the receiver on account of fees to any of Carter's attorneys, was the order of September 25, 1905 (Rec. Vol. 1, p. 205), which refunded to H. G. Stone the balance $4,250 of the $5,000 which under clause "(7)" of the stipulation was to have been "left in the hands of H. G. Stone" for compensation of local counsel in other districts, and which need not have been turned over by Mr. Stone to the receiver in the

first instance. That order, however, expressly provides that such payment was

> "to be without prejudice of the United States, if any they now have, to contend that there has not been a full accounting for the assets to be turned over to the receiver."

All the other allowances to counsel were made as the record shows over the protest of the Government and its counsel.

ALLEGED WAIVER BY TAKING MONEY JUDGMENT.

It is claimed by appellees' counsel that by taking money judgments against I. Stanton Carter and L. D. Carter for the trust assets which the court held was unaccounted for in their hands, that this was a waiver on the part of the complainants, to have them deliver the balance of the funds complainant contends is still in their hands from proceeds of securities received by I. S. and L. D. Carter from Paul, Westcott & Bragg.

Counsel for defense contends that the judgment is a substitute for the assets. This is not sound in law. The agreement of Nov. 6, 1901, was that I. S. and L. D. Carter were to turn over the securities or their *proceeds.*

The evidence as found by the master shows that I. S. and L. D. Carter had converted a large part of these assets into *money*, and the money judgments against them were for the amounts of this money not accounted for by them as found by the master. The judgment instead of being a waiver of the right to

get this money was an adjudication of the right to have it, with the added right to enforce the judgment not only upon the particular money withheld, but upon all property of the defendant.

Even in the case of a common creditor, who as the Supreme Court has said, has an inchoate lien upon all the assets of an insolvent debtor, but a lien which he cannot enforce in a Federal Court of equity until his claim is put in judgment, it has never been held that such judgment destroyed the antecedent equitable lien.

On the contrary, the rulings are that such judgment perfects the antecedent lien, and then if there have been fraudulent conveyances of his property by the debtor antecedent to the judgment, the creditor can reach the property by virtue of the antecedent inchoate lien perfected by the judgment.

Hollins v. *Brierfield Coal Co.*, 150 U. S., 371.

THE EXORBITANT CHARACTER OF THE ALLOWANCES.

If Oberlin M. Carter and his counsel have so far complied with their part of the stipulation of November 6, 1901, as to be entitled to allowances for expenses and attorneys' fees, the appellant still insists that the allowances for attorneys' fees were exorbitant, both in respect to the time for which the allowances were made and in respect to the amount allowed for the services actually rendered.

As we have already seen the Circuit Court in addition to his actual expenses allowed Horace G. Stone as chief counsel pay for his services for 2,000 days at $30 per day, $60,000.

He was allowed $30 per day for every working day from the entry of his appearance for O. M. Carter in the case to final decree in the Circuit Court or for a period of six years and a half.

The facts as to the actual services and time occupied by Mr. Stone as counsel for O. M. Carter in said proceedings, as the same is shown by the record, are set forth in detail in the verified answer of the United States (Rec., Vol. 1, pp. 244 to 266) filed April 8, 1908, to the final petition of H. G. Stone for fees. No proof contradictory of this answer was taken or offered, and except in so far as it relates to matters of opinion as to the value of services, or

other matters of opinion, the facts recited stand proved by the record.

From that record it appears as follows:

(a) Total aggregate of days on which H. G. Stone appeared in said cause in court or before examiners and master. (Rec. Vol. 1, p. 258.)

		Days
1901	Hearing before court on interlocutory proceedings	2
1902	Hearings before court on interlocutory proceedings	1
1902	Before Booth, Special Master, Chicago	6
1903	Before Booth, Special Master, Chicago	1
1903	Before Hewlett, Commissioner, Savannah	5
1903	Before Parsons, Examiner, New York	3
1904	Hearing before court on interlocutory proceedings	1
1904	Before Hewlett, Commissioner, Savannah	2
1904	Before Parsons, Examiner, New York	1
1904	Before Wyman, Examiner, Chicago	5
1905	Hearing before court on interlocutory proceedings	1
1905	Before Wyman, Examiner, Chicago	62
1905	Before Wyman, Examiner, New York	2
1906	Before Wyman, Examiner, Chicago	6
1906	Hearing before the court on merits	9
1908	Hearing before the court on settlement of decree	9
	Total days	116

(Of the 116 days appearances only 13 days were for attendances outside of Chicago.)

(b) Total number of days H. G. Stone was absent from the City of Chicago on business trips and for taking evidence in other places, as shown by his expense vouchers (Rec. Vol. 1, p. 259).

Total days absent as above 114 days

(Which included 13 days of attendance on examiners' hearings in places other than Chicago, and which 13 days are included in the 116 days of appearances.)

From the above it will be seen that the entire number of days expended by said H. G. Stone, in court, or before examiners, commissioners or masters, reckoning every day which he appeared as a day expended, added to the entire number of additional days he was absent in the cause from Chicago, his place of residence, was only 217 days.

This leaves 1783 working days for which he was allowed $30 per day, as days on which H. G. Stone claims to have been engaged in office work in the cause.

The record discloses that there was nothing being done, and that nothing could have been done by said H. G. Stone in the cause that would have seriously occupied his time the greater portion of said time, for the following reasons:

The record shows that the cause was conducted in the Circuit Court for the Northern District of Illinois and in the other districts solely by Mr. Marion Erwin, the Special Assistant to the Attorney General as counsel for the United States, although the local district attorneys were marked of counsel.

That during the same period said counsel of the United States also had charge and conducted certain extensive criminal prosecutions against Benjamin D. Greene and John F. Gaynor, co-conspirators with O. M. Carter, and certain civil suits against them in other districts, which required the use of the same documentary evidence which had to be used in the Chicago case, and also required the personal attention of said counsel of the United States elsewhere than in Chicago, and which necessarily resulted in the suspension of all proceedings in the Chicago case for long periods of time:

(1) It appears that subsequent to the agreement of November 6, 1901, to wit, in December, 1901, the said counsel of the United States was engaged before the Supreme Court of the United States, in an appeal of Greene & Gaynor from a warrant of removal to Georgia granted in New York, and in the execution of the mandate of the Supreme Court thereon in New York in January, 1902. (See *Greene* v. *Henkel*, 183 U. S., 249-257.)

It appears that in February, 1902, that Greene & Gaynor forfeited their recognizances and fled to Canada, and that on April 25-28, 1902, the time of taking testimony (the taking of which had not been commenced) was extended in the Chicago civil case for six months, because of said other engagements of said counsel for the United States. (Rec. Vol. 1, pp. 145-6.)

It appears that said counsel of the United States was thereafter continuously absent at work in Canada on certain extradition proceedings instituted

there against said Greene and Gaynor until September, 1902. (Rec. Vol. 1, p. 255.) (About which time the extradition proceedings went on appeal to the British Privy Council.)

On Septen ber 15, 1902, the time for taking testimony was again extended for three months. (Rec. Vol. 1, p. 147.)

On October 15, 1902, the order of reference to Booth, Master, to report on the account of L. D. and I. S. Carter was made. (Rec. Vol. 1, pp. 147-148.)

Up to this time nothing had been done by said Stone in the way of proceedings in the cause, except to file the answers of said Carters to the bill, yet on the basis of the decree of April 14, 1908, Judge Kohlsaat has allowed H. G. Stone for 278 days of services at $30 per day or $8,340 for his services up to October 15, 1902.

(2) On December 20, 1902 (Rec. Vol. 18, p. 4486), the stipulation was entered into between the parties, admitting in evidence on the part of the complainant and defendants in the civil causes, certain evidence previously taken before a board of officers and before the Court-Martial which had tried Carter for the criminal offenses growing out of the same transactions, and also certain evidence taken in New York, before a commissioner in the Greene-Gaynor removal proceedings, with the understanding that it should be considered as taken in the civil case for the respective parties plaintiff or defendant as designated.

By that stipulation the necessity of taking the great bulk of the evidence in the case was elim-

inated. The evidence so admitted covers 14 volumes of the Printed Record in this cause, and 7,476 of the printed pages of the printed record, besides blue print exhibits of the engineering plats, etc. All of which record was furnished by the United States, and the said Stone had nothing to do in respect thereto but to determine whether he would admit the same as taken in the cause or retake the evidence on part of the respective parties.

(3) The testimony and documentary evidence taken before Booth, master, on the accounting of L. D. and I. S. Carter was taken in four days in October, 1902, and one day in December, 1902. (Rec., Vol. 1, p. 255.) But it involved the introduction of a large amount of documentary evidence on the part of complainant, and with the report of the master takes up 377 pages of the printed record, being practically Volume 10 of the printed record, besides blue print exhibits of accounts.

On January 26, 1903, by consent an order was made taking off the time limit as to taking testimony. (Rec., Vol. 1, p. 149.)

Outside of eight days consumed by the taking of testimony before an examiner in New York, and commissioner in Savannah, Georgia, nothing was done in the cause in the year 1903, except the filing of the report of Booth, master, on the accounting of L. D. and I. S. Carter on April 15, 1903, the filing of Stone's exceptions thereto April 25, 1903 (Rec., Vol. 1, p. 353) and the filing of the exceptions of the United States April 25, 1903.

These exceptions were not heard by the court until

January 7, 1904, at which time interlocutory decree was rendered thereon. (Rec., Vol. 1, p. 150.)

It is the contention of the United States that the reference to Booth, master, and the large amount of evidence which had to be taken therein, and the extensive fight thereon made, was wholly due to the violation of the stipulation of November 6, 1901, by the defendants L. D. and I. S. Carter, in not turning over assets and in not disclaiming all personal interest therein as required by the stipulation.

Notwithstanding this, the Circuit Court has allowed H. G. Stone for every working day in the year 1903, or for 313 working days at $30 per day, $9,390, during said year when nothing was being done, except as to the eight days of testimony taken in New York and Savannah on part of the Government as aforesaid.

(4) In January and February, 1904, the Government took testimony for five days before an examiner, and closed its case on the direct. (Rec., Vol. 1, p. 256.)

In October, 1904, the defense took testimony one day in New York and two days in Savannah. That was all that was done in the progress of the cause in 1904, other than the passing of the interlocutory decree of January 7, 1904, by the court on the exceptions to Booth's report on the accounting of L. D. and I. S. Carter.

Notwithstanding this the Circuit Court has allowed to H. G. Stone 313 working days in 1904 at $30 per day, $9,390, for his services.

(5) In January and February, 1905, testimony

was taken on the part of the defense on 12 days, and on one day there was a hearing on an application of Stone for fees. (Rec., Vol. 1, p. 256.)

During the period from February 14, 1905, to September 18, 1905, complainant's counsel in charge of said civil suits was absent concluding in Canada the extradition proceedings against Greene & Gaynor, which had been resumed following the decision of the British privy council therein. The taking of testimony in the civil proceedings was entirely suspended. (Rec., Vol. 1, p. 256.)

In September, October, November and December, 1905, testimony was taken on part of the defense, before the examiner at Chicago on 49 days and the defense closed their case on December 11, 1905.

On December 29 and 30, 1905, the Government took and closed its testimony in rebuttal.

Notwithstanding that proceedings were suspended in said cause for seven months in 1905, as aforesaid, Judge Kohlsaat allowed said Stone for the entire year of 1905 or 313 working days at $30 per day, $9,390.

(6) On December 8, 1905 (Rec., Vol. 1, p. 154), the counsel of the United States had petitioned the said Circuit Court of the United States at Chicago, setting up the fact of the extradition of Greene and Gaynor, that their trial on the criminal charge was set for trial at Savannah January 9, 1906, and asking for leave of absence, also to be allowed to withdraw from the record the necessary documentary evidence which was common to the two cases, also to ex-

tend the time of the Government to take testimony in rebuttal until after the criminal trial.

Judge Kohlsaat granted the leave of absence, and leave to withdraw the papers, but ruled the complainant to close its testimony in rebuttal before January 9, 1905 (Rec., Vol. 1, p. 156), and it was closed December 30, 1905, as already stated.

(7) During the first five months in 1906, counsel of the United States was on leave of absence as aforesaid and there was nothing being done in said civil case. During said period counsel for the Government conducted the prosecution of Greene and Gaynor in a jury trial lasting three months and nine days at Savannah, which resulted in a conviction and which proceedings in its several branches was not concluded in Georgia until June 1, 1906.

In June, 1906, counsel for both parties spent six days in going over the typewritten evidence before the examiner correcting errors. (Rec., Vol. 1, p. 257.)

In September and October, 1906, nine days were consumed in argument of the merits of the cause before Judge Kohlsaat in the Circuit Court and the case was taken under deliberation by the judge.

Nothing further was done in the cause during the year 1906.

It is contended by Mr. Stone that it took him every working day from January 1, 1906, to September 16, 1906, to prepare his brief on the merits.

Complainant's counsel prepared the Government's brief on the merits after June 1, 1906, which was

a very much more extensive brief, and the complainant's counsel had to carry the burden of proof.

Notwithstanding the above facts Judge Kohlsaat by his decree of April 14, 1908, allowed Mr. Stone for the entire year 1906 or 313 working days at $30 per day, $9,390.

(8) During the year 1907 the said cause was held under advisement by Judge Kohlsaat and nothing was done therein except that in May, 1907, Judge Kohlsaat called for a submission by counsel of requests for findings which were submitted by counsel June 11, 1907. (Rec., Vol. 1, p. 257.)

Notwithstanding this Judge Kohlsaat by the decree of April 14, 1908, allowed Mr. Stone for the entire year of 1907, during which he was holding the case under advisement, or for 313 working days at $30 per day, $9,390.00.

(9) On January 9, 1908, Judge Kohlsaat handed down a partial opinion on the merits, and postponed the settlement of the decree for 30 days.

Counsel were before the court 4 days in February, 1908, and 2 days in March, 1908, on settlement of the decree which was entered March 21, 1908.

Counsel were before the court on two days in April, 1908, on settlement of the supplemental decree of April 14, 1908. (Rec. Vol. 1, p. 164.)

Notwithstanding the above, the court allowed said H. G. Stone for the entire number of working days from January 1 to April 14, 1908, or for 89 days at $30 per day, $2,570.

(10) The fact that it did not require all of Mr.

Stone's time for the six years and a half for which he was allowed $30 per day to attend to the cause in controversy is not only shown by the fact that for the greater portion of said time nothing was being done in the cause, but also by the fact that the counsel for the Government who had the burden to carry and who was successful in the suit, during the same period successfully conducted the removal proceedings of Greene and Gaynor from New York, their subsequent extradition from Canada, their trial before a jury in Georgia, the subsequent hearing of their appeal to the Circuit Court of Appeals for the fifth Circuit, and successfully met by brief their application for certiorari to this court; proceedings which involved almost as extensive a record as in this case, and many more complicated questions of law. Besides that, said counsel for the United States during that period was conducting other litigation for the Government. (Rec. Vol. 1, p. 156.)

If, as Mr. Stone claims in his petition (Rec. Vol. 1, p. 236) he spent the 2,000 working days in his work on said cause for which the court allowed him $30 per day, the reply is that the above stated facts from the record show that no such expenditure of time was required by any competent attorney, for the accomplishment of the work he did.

(11) As to the size of the record, it has been repeatedly stated in the briefs of Carter's counsel that the record consisted of 50,000 pages. The printed record before the Court of Appeals consisted of only 13,377 printed pages, which is sufficiently

large without any need for exaggeration. It is true that there are in addition 5 volumes of blue print exhibits of accounts, of mattresses, plats and other engineering evidence. But the great bulk of the evidence even of that which is printed is documentary, and as we have already seen, the bulk of the oral and other evidence was not taken in this cause, but was previously taken in other proceedings and admitted by consent. The size of the record does not as in ordinary cases, represent time spent by counsel in looking up, and in taking evidence, and is to be considered mainly in the aspect only as it may have involved labor in consideration, analysis, and briefing.

(12) In regard to the time spent in the case by Mr. N. C. Sears, who was allowed by the decree of April 14, 1908, $5,000 as local counsel for O. M. Carter at Chicago:

It appears that he never appeared in the case in any capacity until the hearing on the merits of the cause in September, 1906, that his appearances were entered on the record during the nine days of the hearing and that he made a speech lasting one hour. (Rec., Vol. 1, p. 284.) In the petition of H. G. Stone, chief counsel for Carter, it is stated (Rec., vol. 1, p. 236):

> "I was the only attorney for the defendants who went through the entire record, and took the responsibility of selecting such parts of it as ought to be particularly presented to the court"

(13) We insist that the assumption that Mr. H.

G. Stone necessarily occupied 2,000 working days in the conduct of the case, is a great exaggeration of the facts.

ALLOWANCES LIMITED TO FUND IN LITIGATION IN THE CHICAGO SUIT.

As we have already seen the Stipulation did not consolidate the suits pending in the six districts, Clause "(1)" simply made the suit in the Chicago case a test case on the issues which were common to each suit.

Before the Stipulation of November 6, 1901, was made, $288,346.92 had already been tied up in the hands of receivers in the five districts other than the Northern District of Illinois.

Paragraphs "(7)" and "(8)" both provide that the allowances to be made to Carter and his counsel were to be "From said fund *to be accounted* for to the receiver," showing that it was contemplated that the allowance was to be from the fund in the test case, and not from the funds in hands of the several different receivers in the other districts.

That the fund which was "to be accounted for to the receiver" did not include the funds already taken possession of by the receivers in the other districts is shown by the provision of Clause "(9)" of the stipulation, which expressly excepts from the

fund designated as to be turned over to the receiver the funds of which possession had already been taken by the receivers.

It is well settled that a lien of an attorney for fees for services rendered in a test case, extends no further than the assets within the scope of that case and within jurisdiction of the court, and does not extend to the assets in the other cases which may be affected and collaterally determined by the settlement of the question common to all.

> "Even where there are several suits, intimately connected and relating to the same matter, the attorney's lien on a judgment rendered in any one of them does not cover his fees for services rendered in the others." 3 A. & E. Enc. Law, 2nd Ed., p. 448.

The case of *Massachusetts Construction Co.* v. *Township of Gills Creek,* 48 F. R. 145, is in point:

A railroad construction company employed Hart, an attorney to prosecute a number of cases against a trustee, holding certain township bonds, and against several defendants, South Carolina Townships, which had respectively subscribed bonds to the railroad project. Hart as such attorney brought a separate suit for recovery of the bonds against each township, in each of which suits the trustee holding custody of the bonds was defendant. All the suits were filed in the State courts, except one, which was filed in the U. S. Circuit Court. By common consent the Federal Court suit was made a test case, and that was subsequently decided in favor of the Construction Company.

Hart filed a petition in the United States Circuit

Court against the Construction Company and the Trustee, setting up a claim of equitable lien for legal services rendered, on all the assets covered by all the suits, which were to abide the adjudication of the test case, as well as the assets covered by the test case, and asked for its enforcement. In that case Simonton, Judge, held:

> "An attorney's lien upon the fruits of a suit is limited to the services rendered therein; and although a number of separate suits involve the same questions, and are argued and determined together, the fruits of one are not subject to a lien for services rendered in the others."
>
> *Massachusetts &c. Co.* v. *Township of Gill*, 48 F. R., 145.

It may be true that in the case at bar the question is one of contract, and not of lien by operation of law, but the law on this subject is pertinent to the construction of the contract, where the contract simply makes the Chicago case a test case, to be first tried, and provides that certain assets are to be turned over to the receiver in that case, and that the attorney's fees and allowances are to be made by the court having jurisdiction of that test case, and were to be made out of said assets so to be turned over to the receiver in that case.

We insist that the Circuit Court had no right to read into the stipulation the right to make the allowances, on the basis of the assets already in the courts of other districts, merely because the determination of the issues in the test case collaterally settle the rights in the other districts.

It will be presumed that one of the purposes which

induced the concession on the part of the United States was to confine the expense to that of the test case.

Amount of Assets in Court in Test Case.

The averment in the Petition for prohibition that the maximum amount which under any circumstances can be considered as having been accounted for to the receiver subsequent to and under the stipulation did not exceed $135,971.77 is admitted in the answer of John B. Daish, attorney of O. M. Carter, paragraph 14.

In point of fact (see Rec. Vol. p. 1, 251-2) the total assets turned over to the receiver of the Circuit Court for the Northern District of Illinois subsequent to the stipulation of Nov. 6, 1901, from all sources were as follows:

	Par value.	Cost-value.
Turned over without contest, securities	$ 71,660.00	$ 70,438.75
Turned over after contest before Master and Court, assets	24,825.00	24,726.36
	$ 96,485.00	$ 95,165.11
There was also subsequent to Nov. 6, 1901, turned over to the receivers of the Courts in other districts by consent of defendants, certain assets which had been tied up in the hands of third persons by injunction orders in said courts:		
Assets	$ 47,205.99	$ 40,806.66
	$143,690.99	$135,971.77

Included in the $95,165.11 assets so turned over to the receiver of the Circuit Court for the Northern District of Illinois, were the following assets practically worthless:

Five share of Cotton mill stock par value	$ 500.00
Twenty-five shares Seaboard Co. stock par value	2,500.00
Both of which companies were defunct.	
Also the Colehour note turned over is practically worthless or of problematical value (Rec., vol. 1, p. 195)	11,660.00
	$14,660.00

Amounts Already Paid Out of Said Fund.

(Rec., Vol. 1, p. 316.)

Advance to H. G. Stone for his fees as Carter's attorney	$17,500.00
Advance to H. G. Stone for Carter's local counsel in other districts	5,000.00
Advance to O. M. Carter for maintenance	7,800.00
Advance for sundry expenses of suit to O. M. Carter	5,585.23
	$35,885.23
Also advance to H. G. Stone on expenses (Rec., Vol. 1, p. 184.)	1,089.94
Also there has been paid out of the fund the fund the following general costs:	
To the Masters, Examiners and Stenographers, etc.	7,774.05
Also there has been allowed to the receiver of the Northern District of Illinois (Rec., Vol. 1, p. 405)	6,692.50
Total paid out to decree of April 14, 1908	$51,441.72

Additional Allowances.

In addition to the above Judge Kohlsaat by the decree of April 14, 1908, has awarded to Carter and his attorneys additional allowances as follows:

To Horace G. Stone for fees of chief counsel (in addition to the $17,550)	$42,500.00
To Horace G. Stone for expenses	2,251.31
T. N. C. Sears as fees as local counsel for O. M. Carter	5,000.00
To the International Audit Co., for services of a second accountant for O. M. Carter (the stipulation provided for only one)	1,000.00
To Lyman E. Cooley, for bill for services to Carter as expert engineer and witness (not provided for in stipulation)	1,600.00
	$52,351.31

The said decree of April 14, 1908 (Rec., Vol. 1, p. 406) also provided as to the payment of the fees allowed said H. G. Stone that:

> "And should the assets left in the hands of said receiver after paying the other allowances directed by this decree to be paid by the receiver, be not sufficient to pay the entire allowance for the fees of H. G. Stone it is decreed that he shall be paid such deficiency out of the funds in the hands of the receivers of the other districts."

It will be seen that if the amounts paid out of the fund previous to the decree of April 14, 1908, be added to the additional amounts directed to be paid out by that decree, the aggregate is $103,793.03.

That sum exceeds the total value of the assets which went into the hands of the court in the North-

ern District of Illinois, but if we consider the total amount as turned over $135,971.77 so as to include all the assets turned over subsequent to November 6, 1901, even though the additional amounts turned over to receivers by consent in the other districts, had already been tied up by mesne process in the hands of third persons, it leaves for the Government the successful litigant $32,178.74, out of which $14,660.00 is worthless or of problematical value, out of all the assets which by any means could be considered as turned over, from which to compensate its counsel, pay its expenses of the litigation and for the recovery of its losses for the frauds, while the allowances for the defense aggregate $89,325.98.

Considered in the light of these facts the additional allowances in the decree of April 14, 1908, stand up as a monument of exorbitance.

More Still Claimed.

The decree of April 14, 1908, contains (Rec., Vol. 1, p. 409) this clause:

> "The question of whether said agreement of November 6, 1901, embraces allowances if an appeal is taken by either side is not passed on herein."

(1) Now an appeal was taken to the Circuit Court of Appeals by the United States, which carried up the whole record to that court.

The defendants O. M. Carter *et al.* also cross-appealed to the Circuit Court of Appeals. The defense however had practically no trouble or expense con-

nected with the taking up of the record. Their cross-appeal papers consisted merely of a petition for allowance of cross-appeal, the allowance assignment of errors and citation making twelve printed pages. (Rec., Vol. 32, pp. 13381 to 13393.)

Nevertheless this court is advised that said Horace G. Stone has notified counsel for the United States that he will in due course ask said Circuit Court for the Northern District of Illinois for $60,000 in addition for his services in said Circuit Court of Appeals as chief counsel for O. M. Carter to be paid under said stipulation.

(2) Also an appeal was taken by the United States from the Circuit Court of Appeals, to this court, which brought up the whole record to this court.

The defendants O. M. Carter *et al.* also appealed to this court.

The defense had practically no trouble or expense connected with the taking up of the record. Their cross-appeal papers consisted merely of a petition for allowance of cross-appeal, the allowance, assignment of errors and citation, making only a few printed pages.

Nevertheless this court is advised that there is already a petition of O. M. Carter and his counsel pending before the said Circuit Court of the Northern District of Illinois for $5,000 to Carter's counsel claimed as being under said stipulation, for services claimed to have already been rendered in the proceedings in the Supreme Court, before any proceed-

ings had been had in this court on the appeal or cross-appeal.

Judging the future by the past we may expect a claim of $60,000 more to counsel for Carter for services in this court.

We respectfully request this court to make such comprehensive disposition of the question of allowances and fees, for the entire litigation, as will save the necessity for future appeals, on such applications.

THE ACTION OF THE CIRCUIT COURT OF APPEALS ON THE ALLOWANCES.

The Circuit Court of Appeals in its opinion and decree of March 18, 1909 (Rec., Vol. 33, p. 13431) said:

> "The only objection raised to either of the provisions for such counsel is, that each is excessive, we are of opinion however, that no abuse of discretion appears in the liberal award made by the decree within the purpose of the stipulation, and that no other reversible question arises under these assignments."

We have pointed out in our assignment of errors on appeal to this court (Rec., Vol. 33, p. 13449) and hereto attached, that the assignment of errors filed by the Government on the appeal to the said Circuit Court of Appeals squarely raised the issue for that court to decide on the contention of the Government that there had been no such compliance with their part of the stipulation by the defendants as entitled them to have any such allowances made.

These assignments of error were ignored and not considered by the Circuit Court of Appeals on the ground that the errors assigned were not reviewable.

We respectfully insist they were and are reviewable errors.

The only suggestion of which we have heard, as militating against our right to have them reversed, is that the stipulation made Judge Kohlsaat an arbitrator, and that said questions were determined by him, as such arbitrator, and not as a court.

We respectfully submit that the name of Judge Kohlsaat does not appear in said stipulation from beginning to end thereof.

That the stipulation does not even provide that the allowances were to be passed on by any "Judge," but in every paragraph thereof relating to the passing on such allowances, the provision is that they were to be passed on by "the court."

We respectfully submit that the refusal of the Circuit Court of Appeals to consider the merits of that question under the erroneous assumption that the error assigned was not reviewable on the merits, makes it the duty of this court to review that question on the merits.

In Conclusion.

We respectfully insist that the $17,500 already paid to H. G. Stone as chief counsel for O. M. Carter, the $5,000 already paid over to him for compensation of Carter's local counsel, the $7,800 already advanced to O. M. Carter for his personal maintenance and the $6,675.17 already paid out for him for other expenditures of the defense, aggregating $36,975.17 paid out on Carter's account prior to the final decree of April 14, 1908, in any view of the case were allowances more than sufficient under the circumstances of the case, and that the additional allowances of $52,351.31 for services of counsel and expenditures to final decree of April 14, 1908, and all other allowances claimed for services and expenditures in the Circuit Court of Appeals and in this court, should be disallowed.

Respectfully submitted,

MARION ERWIN,
Special Asst. to the Attorney General,
Solicitor for Appellant.

ASSIGNMENTS OF ERROR ON APPEAL OF THE UNITED STATES TO SUPREME COURT OF THE UNITED STATES.

(Record, Vol. 33, page 13444.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

The United States of America, *Appellant,* *vs.* Oberlin M. Carter, Lorenzo D. Carter, I. Stanton Carter, Horace G. Stone, Nathaniel C. Sears, The International Audit Company, Robert Nelson and Lyman E. Cooley, *Appellees.*	Appeal No. 1534. October Term, 1908.
Oberlin M. Carter, Lorenzo D. Carter, I. Stanton Carter, Horace G. Stone, Nathaniel C. Sears, Lyman E. Cooley and The International Audit Company, *Cross-Appellants,* *vs.* The United States of America, *Cross-Appellee.*	Cross-Appeal No. 1535. October Term, 1908.

ASSIGNMENT OF ERRORS.

Final decree of the United States Circuit Court of Appeals for the Seventh Judicial Circuit March 18,

1909. Appeal to the Supreme Court of the United States.

Now comes Marion Erwin, Special Assistant to the Attorney General of the United States, and Edwin W. Sims, Attorney of the United States for the Northern District of Illinois, who, for the said United States, and by direction of the Attorney General thereof, is about to pray an appeal from the decrees entered by said Circuit Court of Appeals in the above stated causes to the Supreme Court of the United States and for the said United States of America, appellants, complain of errors in the record and proceedings in said Circuit Court of Appeals in said cause, and show to the court that the following errors intervened to the prejudice of complainants and assign the same as errors, viz:

That the said Circuit Court of Appeals by its said final decrees of March 18, 1909, committed error in affirming so much of the decree of the Circuit Court of the United States for the Northern District of Illinois entered on the 14th day of April, 1908, as awarded and directed the payment out of the fund in court or in the hands of the receivers in said cause of each of the following amounts to the following persons respectively, to-wit:

(1) To Horace G. Stone, as attorney's fees for services as chief counsel of Oberlin M. Carter, balance of allowance,	$42,500.00
(2) To Horace G. Stone, for balance allowed to him for expenses,	2,251.31
(3) To Nathaniel C. Sears, as fees for services as the attorney of Oberlin M. Carter at Chicago,	5,000.00
(4) To the International Audit Company or its attorney H. G. Stone, for services rendered the defendant Oberlin M. Carter by Robert Nelson as expert accountant and witness,	1,000.00
(5) To Lyman E. Cooley or his attorney H. G. Stone, for services rendered the defendant Oberlin M. Carter as expert engineer and witness,	1,600.00

That in the making of said awards and the direction of the said payments as aforesaid, the said Circuit Court committed error, and the said Circuit Court of Appeals committed error in affirming the same:

1st: Because the fund from which the same was directed to be paid was decreed to be and was the property of the United States, and not the property of Oberlin M. Carter, and the said sums so directed to be paid were allowances made to the said persons to whom the said allowances were so made for alleged services rendered to said Oberlin M. Carter, and which in law and equity did not constitute a charge upon the fund in court superior to the right and claim of the United States.

2nd: Because the said allowances did not and do not constitute costs or charges taxable against the United States or against any part of the said fund in court out of which it is directed to be paid.

3rd: Because the said Circuit Court of Appeals affirmed so much of the decree of the court below making said allowances under the erroneous assumption that the defendants Oberlin M. Carter, I. Stanton Carter and Lorenzo D. Carter, and their chief counsel Horace G. Stone had performed all the obligations and conditions prescribed in the stipulation of November 6th, 1901, between the United States and Oberlin M. Carter, Lorenzo D. Carter and I. Stanton Carter, mentioned in the opinion of said Circuit Court of Appeals, which they were required to perform in order to entitle them to said allowances mentioned in said stipulation to be made to the said Oberlin M. Carter for expenses and attorneys' fees; whereas, in and by the record in said cause and the decree of the said Circuit Court of Appeals, it is established that the said defendants Lorenzo D. Carter and I. Stanton Carter, did not so comply and have not to this date complied with the obligations they undertook to perform in and by said stipulation, in order that the provisions of said stipulation as to said allowances from the fund in court should be put in operation, and for that reason the said allowances and directions for payments as aforesaid was and is error.

4th: Because it was, among other things, provided in said stipulation of November 6, 1901, relative to the assets claimed by the Government in the several bills referred to in said stipulation, as follows:

> "2. That as to the assets claimed by the Government as assets into which it charges the funds intrusted to Oberlin M. Carter as disbursing officer was diverted, with the proceeds, income and reinvestments thereof where the form of the investments have been changed, and which assets have or may be hereafter traced in to the possession, custody or control of said defendants, and have not heretofore been *bona fide* disposed of by them and therefore beyond their control, shall be forthwith by the said defendants turned over to the receiver appointed in this cause. But the court will determine whether the one Kentucky Central bond and one Michigan Telephone bond charged in the bill to be re-investments of said alleged trust fund, and which bonds are claimed by I. Stanton Carter, should be held by the receiver pending the litigation.
>
> 4. L. D. Carter and I. Stanton Carter will forthwith dismiss their demurrers and file answers disclaiming any personal interest in the aforesaid assets in controversy in this litigation, including the real estate on Eighth avenue, New York, and at Orange, New Jersey, except as to the two bonds claimed by I. S. Carter as above."

And said stipulation, after providing in paragraphs "7" and "8" thereof for the payment "from said fund to be accounted for to the receiver" of certain allowances to be made by the court for attorneys and expenses of the defendant Oberlin M. Carter, contained the following provision:

> "9. The assent of the United States to paragraphs numbered '1', '7' and '8' of this agreement, is predicated upon the understanding

that the said defendants will turn over to the receiver at least substantially all of the assets turned over to I. Stanton Carter, and L. D. Carter, by J. H. Paul and R. E. Westcott and James Bragg, or their proceeds and re-investments, except such as has been, prior to the receivership, *bona fide* paid out or pledged by them for attorneys fees or as expenses in defense of Carter, or expended by them legitimately in the handling of said properties, or which has not already been taken possession of by receivers in this cause."

And it appears from the record of said cause that the said defendant Lorenzo D. Carter and I. Stanton Carter did not, as provided in said stipulation, forthwith file answers disclaiming any personal interest in all of the aforesaid assets in controversy in said litigation, but on the contrary the said defendant Lorenzo D. Carter by his attorney H. G. Stone, filed his answer in which he stated and admitted therein:

"This defendant admits he has not turned over to the receiver appointed herein twenty-one Kentucky Central bonds of $1,000 each, described in said bill of complaint, because the bonds belong to him personally, as he paid out his own money on behalf of said Oberlin M. Carter to the value of said bonds, and has accounted under said agreement with the complainant with regard to said disbursements."

And it further appears from the record that the failure of the said Lorenzo D. Carter and I. Stanton Carter to turn over the above and other assets claimed by the complainant in its bill, as they agreed to do in the stipulations of November 6, 1901, forced complainant to obtain a reference to a master to compel an accounting from said L. D. Carter and I. Stanton Carter, on which accounting said L. D. Car-

ter attempted to set off as against the said assets traced into his hands, and not delivered to the receiver, a personal claim for salary lien on said assets alleged to be due him as agent for Oberlin M. Carter for eighteen months services $15,000.00, and other illegal claims of credit. And the said I. Stanton Carter, on said accounting, attempted to set off as against the said assets traced into his hands and not delivered to the receiver, a personal claim for salary lien on said assets alleged to be due him as agent for Oberlin M. Carter for $7,500.00 and other illegal claims of credit.

And it appears by the record in the cause, that the said Lorenzo D. Carter and I. Stanton Carter, by themselves and by their said attorney H. G. Stone, not only contested before the master for said personal claims for salaries of L. D. Carter and I. Stanton Carter on said assets which they had so withheld from delivery to the receiver, contrary to the stipulation of November 6, 1901, but they continued to contest for the same before the Circuit Court to the final decrees of that court, and before the Circuit Court of Appeals, so that a very large part of the time for which said allowance of $60,000.00 to said H. G. Stone as chief counsel was made, was consumed by the said H. G. Stone in contesting for the personal claims of said L. D. Carter and I. Stanton Carter to the said assets in controversy and for their right to withhold the said assets from the receiver and from complainant, and complainant was put to great trouble, expense and delays in compelling the said L. D. Carter and I. Stanton Carter to deliver up the

part of said assets to the receiver which they did finally deliver, but a very large part of which the said defendants L. D. Carter and I. Stanton Carter have not delivered to the receiver or accounted for to this day, as is shown by the record and the final decree of the said Circuit Court of Appeals giving complainants money judgments

against L. D. Carter for balance of	$ 7,577.04
against I. Stanton Carter for	18,304.18
	$25,781.22

for the proceeds of said assets traced into their hands as claimed in the bill and still unaccounted for by them. The said balance still unaccounted for being in addition to ten Kentucky Central bonds of the par value of $10,000.00, withheld by L. D. Carter from the receiver until March 13, 1903, and delivered after contest before and finding by the master, and eleven Kentucky Central bonds withheld from the receiver until January 13, 1904, and delivered after contest before the master and the court and after judgment of the court.

And it appearing from the report of the master, as affirmed by the said Circuit Court, and said Circuit Court of Appeals, that all of the funds in controversy, traced into the possession of L. D. Carter and I. Stanton Carter, with the exception of $21,529.15 were turned over to said I. Stanton Carter and L. D. Carter by J. H. Paul, R. W. Westcott and James Bragg, it therefore appears affirmatively from the record and decrees of said Circuit Court of Appeals that the said defendants were not entitled to have said allowances made to them or for fees and expenses out of the fund in court under said stipulation.

4th. (a) That the said Circuit Court of Appeals in its opinion, which is made a part of its said decrees of March 18th, 1909, aforesaid, committed error in holding and stating in reference to the aforesaid allowances directed in the court below to be paid out of the fund in court as follows:

> "The only objection raised to either of the provisions for such counsel is, that each is excessive. We are of opinion, however, that no abuse of discretion appears in the liberal awards made by the decree, within the purpose of the stipulation, and that no other reviewable question arises under these assignments."

whereas, the failure of the defendants to comply with their undertaking as to the prompt delivery to the receiver of the assets turned over to said I. Stanton Carter and L. D. Carter by J. H. Paul, James Bragg and R. E. Westcott, which prompt delivery was made a prerequisite to the making of such allowances to them or their counsel under the said stipulation, was properly raised and preserved by the 14th, 15th, 17th, 18th and 19th assignments of error filed in the said Circuit Court for the Northern District of Illinois on April 28th, 1908, at the time of the appeal taken by the United States to said Circuit Court of Appeals, and also by the 14th, 15th, 17th, 18th and 19th assignments of error contained in the brief in said appeal and cross-appeal causes filed in said Circuit Court of Appeals on November 12th, 1908, which brief was before said Circuit Court of Appeals on the argument of said causes.

5th: That the said Circuit Court of Appeals committed additional error in its decrees of March 18th, 1909, affirming the decree of said Circuit Court for the Northern District of Illinois, fixing the compensation of said Horace G. Stone as fees for services as chief counsel of Oberlin M. Carter for 2,000 days at $30.00 per day, $60,000.00, and decreeing that the balance of said fee so allowed and not already paid him out of said fund, to-wit, the sum of $42,500.00, should be paid out of the fund in court decreed to belong to the United States; because said allowance is excessive, both as to time and rate, and exorbitant considering the services actually rendered and the time reasonably required for such services, and the fact that said allowance, together with the other allowances to be made under the said stipulation of November 6, 1901, were to be made from the funds which, after the stipulation, were to be accounted for to the receiver, and the maximum amount which, under any circumstances, can be considered as having been accounted for to the receiver, including those assets which were forced from defendants after several years of contest before the master and the court, did not exceed $135,971.77; and whereas said Horace G. Stone had already been advanced out of said fund for fees as chief counsel for Oberlin M. Carter, under interlocutory decrees of said Circuit Court, $17,500.00, which, with the said balance of $42,500.00 directed to be paid him as attorneys fees, and together with other allowances out of said fund made for other counsel of Oberlin M. Carter, and for personal and other expenses of

Oberlin M. Carter, brings the allowances decreed to said Oberlin M. Carter, or his counsel, up to the sum of $88,236.54, making about two-thirds of the assets finally recovered into the hands of the receivers.

6th. That the said Circuit Court of Appeals committed additional error in its said decrees of March 18, 1909, in affirming that part of the decree of the said Circuit Court in said cause, which decreed the sum of $1,000 to be paid from the funds which have been or may be realized by the receiver from the proceeds of the assets which have been decreed to belong to the complainant, to H. G. Stone as attorney for The International Audit Company and Robert Nelson for services rendered the defendant Oberlin M. Carter by said Robert Nelson as expert accountant and witness, because:

First: The court had already allowed and paid to Charles McPherson out of the fund in court, the accountant claimed to have been employed by said defendant under the terms of the agreement of November 6, 1901, the sum of $1,580.73 for his services, and the said stipulation provided for the payment of but one such expert accountant.

Secondly: The bill filed in court by said The International Audit Company and Robert Nelson, is for a lump sum of $1,000 for the services of said Nelson, and without any specification of the particular days, or of the number of days in which said services were rendered, and no fact is stated in the

pleadings or in the bill rendered, or in the evidence, which would make it ascertainable by the court whether said charges for services are not in excess of $10 per day for his services when needed and actually employed, plus his expenses, which was the limitation provided in said agreement even as to the payment of the one accountant provided for therein:

Thirdly: The said services are not chargeable on the funds decreed to belong to the complainant, and there is no lien therefor on any of the funds in court, the claim being one of private contract between said Oberlin M. Carter and said witness:

Fourthly: The said The International Audit Company and Robert Nelson in no event would be entitled to be paid out of said fund in court as a witness for said Carter a sum exceeding $1.50 per diem and mileage, as fixed by law, if such a claim had been made and presented, but no such claim was presented.

7th: That the said Circuit Court of Appeals committed additional error in its said decrees of March 18, 1909, in affirming that part of the decree of the said Circuit Court in said cause which decreed the sum of $1,600 to be paid from the funds which have been or may be realized by the receiver from the proceeds of the assets in controversy which have been decreed to belong to the complainant, to H. G. Stone as attorney for Lyman E. Cooley for services rendered the defendant, Oberlin M. Carter as ex-

pert engineer and witness for sixteen days at $100 per day, because

First: There is no provision in said agreement of November 6, 1901, for the payment from the funds in court for any charges for services as an expert engineer rendered or to be rendered by any one to said defendant. The only kind of expert for whom compensation was provided in said agreement being for one expert accountant.

Secondly: That if said Lyman E. Cooley is entitled to compensation out of said funds at all, his compensation should be limited to the lawful fees for four days attendance, the time stated in the bill for services, filed in court by him, and at the rate of $1.50 per day, the compensation for witness fees as fixed by law.

Thirdly: That said services of Lyman E. Cooley are not chargeable on the funds decreed to belong to the complainant, and there is no lien therefor on any of the funds in court, the claim being one only of private contract between said Oberlin M. Carter and said expert witness.

MARION ERWIN,
Special Assistant to the Attorney General,
and
EDWIN W. SIMS,
U. S. Attorney,
Solicitors for Appellants.